Supreme Court, U.S.
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No. 05-

IN THE

Supreme Court of the United States

ERGONOME INCORPORATED *ET AL.*
Petitioners

v.

COMPAQ COMPUTER CORPORATION
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether or not fair use of a copyright under 17 U.S.C. § 107 can be affirmed when the jury had not been permitted to know the specific commercial purpose of the infringing work, the customary price of the infringed work, or the quantity (32,236,510) of infringing copies.

2. Whether or not the maker and consumer of 32,236,510 unauthorized copies of a copyrighted work is entitled to prevail on the fourth fair use factor, and to be exempt from actual damages pursuant to 17 U.S.C. § 504(b), because the copyright owner could not show that distribution of the 32,236,510 unauthorized copies had deprived it of sales to third parties.

3. Whether or not a $2.7 million attorneys' fees award against the owner of the copyright to the infringed work, a derivative discovery sanction in that amount against its author, and contempt holdings against her and the president of the copyright owner for purported failure to answer three interrogatories, are consistent with the purposes of the Copyright Act.

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Petitioners are Ergonome Incorporated ("Ergonome") and two of its officers, Stephanie L. Brown and Thomas Mowrey. Ergonome has no parent, and no publicly held company owns more than 10% of its stock.

Respondent is Compaq Computer Corporation ("Compaq"), a wholly owned subsidiary of Hewlett-Packard Company.

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PETITION FOR WRIT OF CERTIORARI

Petitioners Ergonome Incorporated, Stephanie L. Brown and Thomas Mowrey respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit, App. A, Filed October 5, 2004, is reported at 387 F. 3d 403.

The order denying the petitions for rehearing and for rehearing *en banc*, App. B, Filed November 15, 2004, is not reported.

The Amended Final Judgment of the United States District Court for the Southern District of Texas, App. C, decided March 30, 2002 and entered April 1, 2002, is reported at 210 F. Supp. 2d 845.

The district court's Findings of Fact and Conclusions of Law Regarding Laches and Equitable Estoppel, App. D, Decided March 30, 2002 and Entered April 1, 2002, is also reported at 210 F. Supp. 2d 845.

The district court's Memorandum and Order denying Ergonome's Motion to Disregard Findings 5 & 6 and Enter Judgment as a Matter of Law, and for a New Trial, App. E, Decided February 8, 2002 and Entered February 11, 2002, is reported at 2002 U.S. Dist. LEXIS 6224.

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The district court's Memorandum and Order holding "that Ergonome's textual and pictorial expression in *The HAND Book* is copyrightable", App. L. Decided March 26, 2001 and Entered March 27, 2001, is reported at 137 F. Supp. 2d 768.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was issued on October 5, 2004. Petitions for rehearing and for rehearing *en banc* were denied on November 15, 2004. This Court has jurisdiction over this petition under 28 U.S.C. § 1254(1).

CONSTITUTIONAL and STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Article I, § 8, Clause 8.

Title 17 United States Code, §§ 106, 107, 504 and 505.

Federal Rules of Evidence, Rule 403.

Federal Rules of Civil Procedure, Rule 33.

The complete constitutional and statutory provisions involved are lengthy, and therefore, pursuant to Supreme Court Rule 14.1.(f), they are set forth fully in Appendix I, pp. 57a-60a.

STATEMENT OF THE CASE

A. Procedural History.

This copyright infringement action derives from Ergonome's publication of "Preventing Computer Injury: The HAND Book" ("THB"), a 99-page book with 88 illustrations showing computer users how to avoid keyboard-related repetitive stress injury ("RSI"), with particular emphasis on hand and arm positions and motions, and Compaq's making and commercial distribution of 32,236,510 substantially similar copies thereof, entitled "Safety & Comfort Guide" ("SCG").

On March 28, 1997, Compaq filed suit for declaratory judgment of no copyright infringement in the United States District Court for the Southern District of Texas, Houston Division, where the case was assigned to Judge Melinda Harmon. The initially named declaratory defendants were Ergonome, a New York corporation, and Stephanie L. Brown, a New York resident, who, in addition to having been the author of the infringed book, was and is the chief executive officer of Ergonome. Thomas Mowrey, Ergonome's president, also a resident of New York, was added as a defendant in 2000.

The sole asserted cause of action throughout the suit lay under the Copyright Act, U.S.C. Title 17. Allegations of alter ego liability for Compaq's attorneys' fees were made against Brown, and later Mowrey, but they were never supported by the pleading and proof of fraud which is required for alter ego liability under both Texas and New York corporation law.

In June, 2000, Compaq moved for summary judgment on copyrightability. Ergonome opposed and cross-moved on both copyrightability and infringement. On March 27, 2001, the district court held for Ergonome on copyrightability, but bound over for trial the ultimate questions of infringement — whether or not Compaq had copied, and if so, whether the copies bore a substantial or *de minimis* similarity to Ergonome's original. Compaq's assertion of the fair use affirmative defense pursuant to

17 U.S.C. § 107 was, perforce, also held for trial. The district court's summary judgment order holding copyrightability is reproduced at App. L, pp. 78a-101a.

Judge Harmon tried the case to a Houston jury on July 2-11, 2001. Based upon seeing direct, documentary evidence that Compaq copied THB, the jury found copying, the first of the two elements of copyright infringement. Then, after performing the "ordinary observer" test by comparing the relevant portions of THB with their respective copies in SCG, the jurors found that Compaq's copies were substantially similar to Ergonome's original. Thus, the jury found both elements of copyright infringement. See Special Interrogatory Jury Form, reproduced at App. K, pp. 74a-77a.

However, the jury found for Compaq on its *de minimis* contention and on Compaq's affirmative defense of fair use. *Id.* Following trial, the district court held that Ergonome's claims were further barred by laches and equitable estoppel (App. D, pp. 25a-33a), even though the suit had been filed well within the three-year statute of limitations. The court entered an Amended Order of Final Judgment of no copyright infringement on April 1, 2002, and awarded $2.7 million in attorneys' fees to Compaq against Ergonome, against Brown as an "alter ego" of Ergonome and against Mowrey by defining the word "Ergonome" to include both him and Brown. App. C, pp. 23a-24a.

On July 27, 2001 Ergonome moved the district court for judgment as a matter of law to disregard the *de minimis* and fair use findings, and for a new trial. See App. N, pp. 121a-138a. The motion was denied on February 11, 2002. See App. E, pp. 34a-38a. Brown and Mowrey's Motion to Alter or Amend Final Judgment was also denied, on April 1, 2002. See App. H, pp. 49a-56a.

All three defendants appealed to the United States Court of Appeals for the Fifth Circuit — Ergonome on the copyright claims and attorneys' fees, and Brown and Mowrey on the "alter ego" attorneys' fees and the contempt holdings against them.

After appellate briefing and oral argument in March, 2004, a panel consisting of Judges Edith H. Jones, James L. Dennis and Charles W. Pickering, Sr. affirmed the finding that Compaq was not liable for copyright infringement, stating that its opinion was based solely on Compaq's fair use affirmative defense.

The panel also upheld the $2.7 million attorneys' fees award against both Ergonome pursuant to 17 U.S.C. § 505, and against Brown as an "alter ego discovery sanction" for purportedly failing to answer three interrogatories. The attorneys' fees judgment against Mowrey was reversed, but he and Brown remained in contempt for not answering the interrogatories, which Brown had answered three times and which Mowrey was never asked to answer. Ergonome petitioned for rehearing *en banc*, and Brown and Mowrey petitioned for panel rehearing. Both petitions were denied without opinion. See App. B, pp. 21a-22a.

B. Background of the Copyright Litigation.

1. Creation and Purpose of THB, the Infringed Work.

Stephanie Brown, a Juilliard-trained concert pianist, wrote THB in 1992-93, personally filing two copyright registrations on it during its creation. On September 30, 1993, she and her husband, Thomas Mowrey, formed Ergonome for the purposes of publishing and marketing the book, and Brown assigned all her rights to the corporation. The main subject matter of the book was the prevention of computer-related injuries through instruction in correct hand and arm positions and motions at the keyboard.

2. Creation and Purpose of SCG, the Infringing Work.

In the early 1990s, Compaq, like other computer manufacturers, was being sued by users of its equipment, alleging that they had suffered repetitive stress injuries from typing on Compaq computer keyboards. These suits asserted that the keyboard was defectively designed and that manufacturers had failed to provide warnings and instructions on safe keyboard use.

Compaq began distributing an ergonomics booklet with its computers in 1991. However, it contained no instructions on hand and arm positions and motions at the keyboard. Therefore, late in 1993, approximately simultaneously with Brown's completion of THB, Compaq was actively seeking to replace its 1991 booklet "... because Compaq desired to provide its end users with greater information on avoiding keyboard-related injuries." *Compaq Computer Corp. v. Ergonome, Inc.*, 137 F. Supp. 2d 768, 770 (S.D. Tex. 2001). App. L, p. 80a.

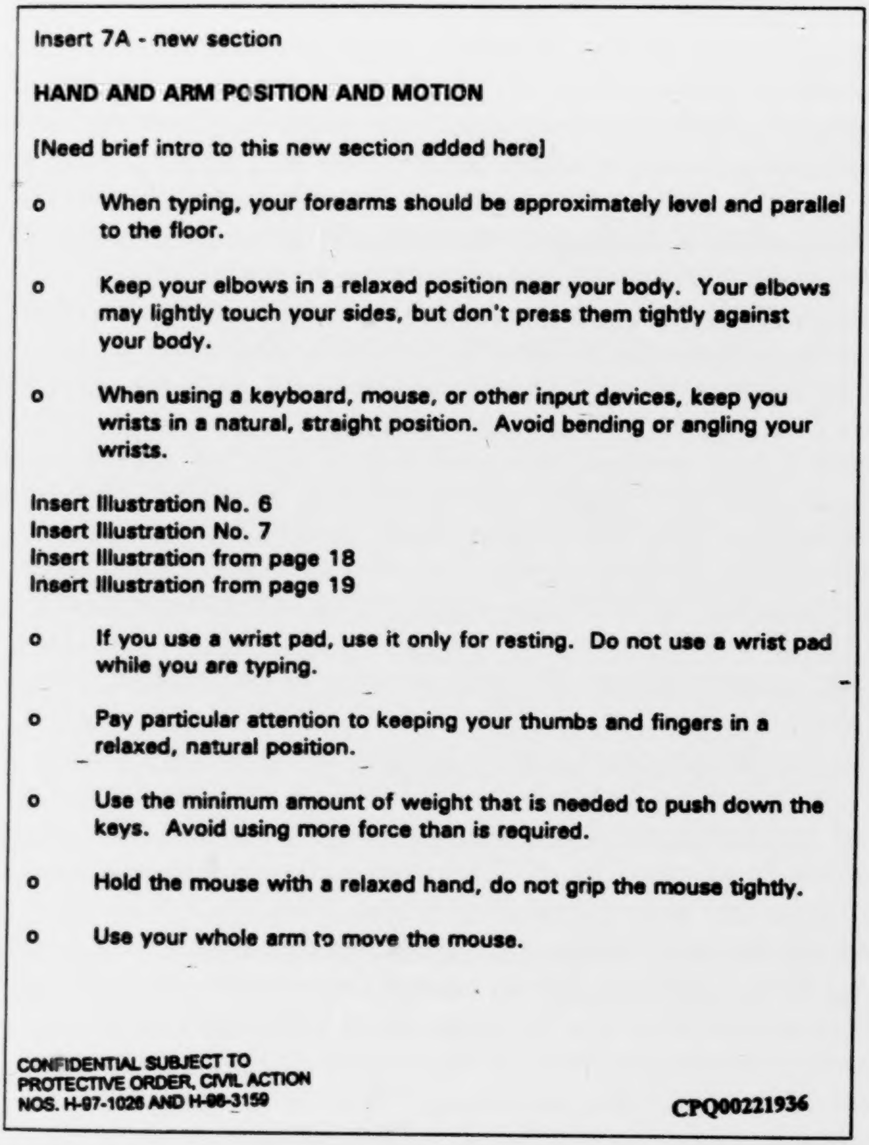
The new booklet was to become Compaq's 1994 "Safety & Comfort Guide" ("SCG"). Compaq's Manager of E-Commerce, Douglas James, disclosed that an additional purpose of the new Safety & Comfort Guide was to protect Compaq from liability in the keyboard-injury litigation:

> Q. You were aware of the fact that your company had multiple suits pending against it where people --their customers had alleged that they injured their hands, wrists, or arms in using your keyboards? Are you aware of that? ...
>
> A. Yes.
>
> Q. Okay. Was it your understanding that the Safety and Comfort Guide was being put together, at least in part, to avoid Compaq's liability for such lawsuits? ...
>
> A. Yes

Deposition of Douglas James, App. O, pp. 142a-143a.

The principal author of SCG was Compaq's Manager of Human Factors, Cynthia J. Purvis. Purvis had obtained a pre-publication copy of THB in December, 1993 or January, 1994, and thereupon wrote a manuscript for a new section of the SCG, to be entitled, "Hand and Arm Position and Motion":

Purvis Manuscript for Compaq's SCG:
App. Y, p. 195a



Insert 7A - new section

HAND AND ARM POSITION AND MOTION

[Need brief intro to this new section added here]

- When typing, your forearms should be approximately level and parallel to the floor.
- Keep your elbows in a relaxed position near your body. Your elbows may lightly touch your sides, but don't press them tightly against your body.
- When using a keyboard, mouse, or other input devices, keep you wrists in a natural, straight position. Avoid bending or angling your wrists.

Insert Illustration No. 6
Insert Illustration No. 7
Insert Illustration from page 18
Insert Illustration from page 19

- If you use a wrist pad, use it only for resting. Do not use a wrist pad while you are typing.
- Pay particular attention to keeping your thumbs and fingers in a relaxed, natural position.
- Use the minimum amount of weight that is needed to push down the keys. Avoid using more force than is required.
- Hold the mouse with a relaxed hand, do not grip the mouse tightly.
- Use your whole arm to move the mouse.

CONFIDENTIAL SUBJECT TO
PROTECTIVE ORDER, CIVIL ACTION
NOS. H-97-1026 AND H-98-3159

CPQ00221936

3. Direct Evidence That Compaq Copied THB.

In this manuscript, Purvis instructed that four illustrations from Ergonome's book were to be "inserted" into Compaq's SCG. That is, "Insert Illustration No. 6" in the Compaq manuscript refers to Illustration No. 6 from THB, and "Insert Illustration No. 7" refers to Illustration No. 7 from THB. "Insert Illustration from page 18" refers to page 18 of THB, and "Insert Illustration from page 19" refers to page 19 of THB. Purvis admitted that the specific illustration numbers and page numbers in this manuscript were actually illustration and page numbers in THB. See Purvis trial testimony, App. X, p. 194a. THB Illustrations Nos. 6 and 7, THB Illustrations from page 18 and page 19, and Compaq's "inserted" copies of them are shown at App. Z, pp. 198a-205a.

4. The Copied Selection and Arrangement Was Not Only Original, But Unique.

As shown at App. Z, pp. 198a-199a, when Compaq personnel "inserted" their copies of Illustrations Nos. 6 and 7 from THB into SCG, they also inserted the captions which were attached to Ergonome's illustrations, thus copying a selection and arrangement which had been found protectable by the district court under *Feist v Rural Telephone Services Company, Inc.*, 499 U.S. 340 (1991). See the district court's order holding protectability at App. L pp. 89a-92a. At trial, Purvis testified that the selection and arrangement of illustrations and text which Compaq copied from page 14 of THB was not only original, the criterion for copyrightability under *Feist*, but had been unique before Compaq copied it. Asked whether she had ever seen the particular selection and arrangement of illustrations and text on page 14 of THB anywhere else, Purvis responded, "No." When asked if there mightn't be one other place, she answered, "That is the pages in our Safety and Comfort Guide." App. X, p. 193a.

5. Amount and Substantiality of the Copied Material.

Quantitatively, four of a total of 88 illustrations in Ergonome's 99-page book were copied to produce four[1] of a total of seven illustrations in Compaq's 32-page booklet. These illustrations, their captions, the relationship of illustrations to captions, and the seven phrases, all of which were found to be copyrightable by the district court, constituted the quantum of material copied from THB. This material constituted the only substantive difference between Compaq's 1991 ergonomics booklet and the 1994 SCG. All of Ergonome's originals and Compaq's copies are shown in comparative tables at App. Z, pp. 197a-211a.

Qualitatively, Brown's metaphor for neutral wrist positioning at a computer keyboard, "The Natural Line", which Purvis testified was a unique expression in her experience, is half of the title of Chapter One ("The Natural Line and the Dangerous Angle") of THB, and appears ten more times in Brown's book (see App. Z, p. 206a), most pertinently as a caption attached to Illustration No. 7 in Chapter Two. The contrasting descriptive metaphor, "Angled-Wrist Position", which appears five times in THB (see App. Z, p. 208a), was also copied by Compaq, with the illustration to which it was attached. Further, by copying both of these composites, and their relationship to each other, Compaq copied a third composite. This material formed the heart of Brown's book.

6. Compaq Asks for and Receives a Discount Price to Buy What It Had Already Copied.

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[1] In 1995, Compaq issued an electronic version of the 1994 SCG. Compaq's 1995 Guide was textually identical to the 1994 SCG, but it contained substantially enhanced versions of the four illustrations that had been copied from THB into the 1994 SCG. See App. Z, pp. 201a and 205a. Thus, Compaq actually derived eight illustrations for its SCGs from the four THB illustrations.

The insertions of copies of Ergonome's illustrations and text into the templates for Compaq's booklet were made on February 10, 1994. Six weeks later, on March 22, 1994, Purvis called Ergonome and asked Mowrey for a volume discount price to buy a copy of THB to bundle with every Compaq computer. On March 25, Mowrey responded with a five-page letter (App. R, pp. 154a-162a) in which he offered a price of $7.95 per book in quantities over 100,000, a 60% discount from THB's customary price at that time of $19.95 per copy. *Id* at 160a, par. 4. In this March 25, 1994 letter, Mowrey specifically informed Purvis that THB was for sale only as a complete book, and was not available in excerpted form. *Id*, par. 1.

7. Compaq Elects to Publish and Distribute Its Copied Version Rather Than Buying Books From Ergonome.

Purvis did not overtly respond to this letter in any way, and ignored a dozen follow-up telephone messages from Mowrey. Covertly, however, she responded by proceeding toward publication of the SCG, including in it only those excerpts from THB which Compaq wanted. In August, 1994, unknown to Ergonome, Compaq published the SCG, incorporating Compaq's copies of the four illustrations, seven phrases, and the selection and arrangement of illustrations and captions from THB shown in App. Z, pp. 197a-211a. Compaq began distributing the infringing booklets in September, 1994. See App. U, p. 172a.

8. Ergonome Visits Compaq, Where Purvis Pointedly Gives Brown a Copy of the Infringing SCG.

Still unaware of what Compaq had done, Mowrey and Brown visited Compaq on November 11, 1994 to demonstrate "KeyMoves", a software derivative of THB which Ergonome had just created. Purvis attended this meeting, and gave Brown a copy of SCG just before the demonstration began, pointedly showing Brown that

Compaq listed THB on the last page, "For Further Information", of the new SCG.

When Mowrey began demonstrating KeyMoves to the assemblage, Brown perused SCG and immediately noticed that substantial material had been "inserted" from THB into SCG. However, she did not raise the issue at the time. The publication date printed on the title verso page of SCG showed that it had already been published three months earlier, and it appeared at this meeting that Compaq was likely to take a KeyMoves license which would have subsumed the infringement.

9. After Multiple Contacts Concerning Voluntary Licensing Fail, Ergonome Gives Notice Of Required Licensing.

At Compaq's request, a second meeting was held in Houston two months later, on January 16, 1995. After this meeting, Ergonome believed that progress had been made toward licensing. Continuing contacts between Ergonome and Compaq ensued over the following period of almost two years, including multiple telephone calls, letters from Ergonome and a further meeting in California, all ostensibly directed toward Compaq taking the license. However, by December, 1996, it had become clear to Ergonome that Compaq had no intention of taking the license voluntarily. Mowrey therefore wrote a letter to Purvis on December 10, 1996, stating that Compaq would be required to take a license for the material which it had appropriated from THB.

A Compaq lawyer wrote back to Ergonome, inquiring as to exactly what material Ergonome was claiming to have been misappropriated. On March 13, 1997, Ergonome's attorneys responded, citing precisely the illustrations, captions and sentences that were ultimately found by the district court to be copyrightable and by the jury to have been infringed. Ergonome's attorneys gave Compaq eighteen days to respond.

10. Compaq Sues Preemptively and Requests Regional Justice.

Compaq responded by filing an anticipatory declaratory judgment lawsuit on March 28, 1997, three days before the end of the grace period given by Ergonome's attorneys. Early in the jurisdictional litigation, Compaq pled that it was entitled to be "protected" by the Texas district court against Ergonome's claims, and that the Texas district court should therefore favor Compaq's preemptive lawsuit over the suit filed by the true plaintiff, Ergonome, less than a week later in New York. Citing dicta from a prior Southern District of Texas case, Compaq made several overt appeals to Judge Harmon to abandon her Constitutional role as even-handed arbiter of justice, and instead, to become the "protector" of her fellow Texas resident, Compaq. Two such appeals were:

> This Court has an interest in protecting its resident corporations, such as Compaq, from such outlandish claims. See Bounty-Full Entertainment, Inc., 923 F. Supp. 950, 957 (S.D. Tex. 1996).

Compaq's Second Supplemental Submission and Response to Defendants' Reply to Plaintiff's Surreply, page 2, filed November 12, 1997.

> Therefore, given the analysis detailed above, this Court should acknowledge the legal requirement of giving deference to the first-filed rule and to Compaq's choice of forum, and also **exercise its obligation to protect its resident Compaq** from the unjustified and outlandish claims made by nonresidents who are simply trying to improperly benefit from Compaq's hospitality ... . (emphasis added)

Plaintiff Compaq Computer Corporation's Brief In Opposition To Defendant's Motion To Dismiss Or, In the Alternative, Stay, page 12, filed May 15, 1997.

Judge Harmon gave the requested deference. and maintained Compaq's anticipatory suit in her court in Texas.

11. Compaq Admits That It Knew THB Was Only For Sale As A Complete Book, and That It Didn't Like Ergonome's Prices.

Early in the litigation, Purvis revealed in an affidavit that she had understood from Mowrey's March 25, 1994 letter that THB was not for sale in portions. App. S, p. 165a, numbered paragraph 16. She further testified that Compaq had rejected Ergonome's proposals because it did not like Ergonome's prices. *Id*, p. 165a, numbered paragraph 31, and p. 166a, first paragraph.

The customary price of THB in February, 1994, the month in which it was published (and the time of the initial infringement), was $19.95. See March 25, 1994 letter from Mowrey to Purvis, App. R, p. 160a. That price was printed on the back cover of the copy of the prepublication copy of THB which Purvis "referenced" when writing her manuscript instructing the "insertion" of Ergonome's illustrations into Compaq's booklet. The customary price of THB throughout the three-year period during which Compaq distributed its infringing copies was $13.25, the average price of all copies sold. See Declaration of Thomas Mowrey, App. T, p. 169a. The discounted price offered to Compaq in Mowrey's March 25, 1994 letter was $7.95 for quantities in excess of 100,000. See App. R, p. 160a. Compaq admitted that it never made a counteroffer to Ergonome. Compaq Admissions of Fact, App. U, p. 172a.

In sum, rather than buying the complete books or their software derivative from Ergonome at either the customary or discounted prices, Compaq had simply proceeded to make 32,236,510[2] copies of the SCG, incorporating just the portions of THB which it wanted. Compaq distributed these copies between September, 1994 and October, 1997. App. U, p. 172a. Approximately half of the copies were made before Compaq received Ergonome's notice of infringement, and half afterward. All were made within the three-year statute of limitations under the Copyright Act.

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[2] The 32,236,510 copies include both the 1994 and 1995 Guides. See trial testimony and affidavit of Compaq manager, Mary Kuna, App. Q, pp. 147a-152a.

C. The District Court Holdings Which Resulted in the Jury's Fair Use Finding.

1. The District Court Withheld from the Jury All Evidence of Actual Damages, Including the Prices of the Infringed Work and the Number (32,236,510) of Infringing Copies.

17 U.S.C. § 504(b) provides in pertinent part:

> Actual Damages and Profits.— The copyright owner is **entitled** to recover the actual damages suffered by him or her as a result of the infringement, and any profits of the infringer that are attributable to the infringement and are not taken into account in computing the actual damages. (emphasis added) App. I, p. 59a.

In *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 562 (1985), the Court defined commercial use as "... whether the user stands to profit from exploitation of the copyrighted material without paying the customary price." Ergonome had pled actual damages consisting of "the customary price" of THB multiplied by the number of infringing copies, with the jury to determine whether "customary price" should be defined as the $19.95 customary price at the time of the initial infringement in February, 1994, the $13.25 average selling price of THB throughout the three-year period during which Compaq distributed its infringing copies, or the $7.95 discount price which Ergonome had offered to Compaq in Mowrey's March 25, 1994 letter.

Two weeks before trial, Compaq attacked this pleading with an untimely summary judgment motion styled as a "motion in limine", arguing that, in spite of Compaq's specific solicitation of and receipt from Ergonome of the discount price ($7.95), Ergonome had no evidence of actual damages. The motion was argued at a pretrial hearing on June 28, 2001. There, counsel for Compaq contended that, in order to qualify for actual damages, Ergonome would have to prove that Compaq's 32,236,510 copies either had cost Ergonome sales to third parties, or to Compaq itself.[3] See App. V, pp. 174a-180a.

After argument at a second pretrial hearing the next day, the district court agreed with Compaq that Ergonome needed to prove the loss of sales to third parties, or to Compaq itself, in order to qualify for actual damages. The court then ruled from the bench that Ergonome would be forbidden to present to the jury any evidence whatsoever of actual damages pursuant to 17 U.S.C. § 504(b). See Transcript of Pretrial Hearing, June 29, 2001, App. M, pp. 102a-120a.

This evidentiary exclusion encompassed both the customary prices of Ergonome's book and the number of copies (32,236,510) that Compaq had made. Citing the Court's rulings in *Harper*, *supra*, Ergonome argued strenuously that it could not rebut Compaq's fair use defense without being able to tell the jury how many copies Compaq had actually made. App. W, pp. 190a-191a. The district court's response was:

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[3] Ergonome need not have proved that Compaq would under some unknowable circumstances have chosen to buy rather than steal, but rather that in order for Compaq to legitimately obtain what it copied, it had no option but to buy from Ergonome, at Ergonome's stated prices and terms, unless other prices and terms were negotiated.

> "I don't think that fair use has to do with how many times it goes out. It has to do with what you used." *Id* at 191a.

With this ruling, the district court eviscerated Ergonome's case, no doubt leaving the jurors wondering why their time was being taken for a trial in which they were not asked to determine damages or even informed of the scope of infringement. This evidentiary vacuum cascaded directly into the fair use arena, where the jury was required to decide the first statutory fair use factor — the purpose and character of the use — without knowing either that Compaq had made 32,236,510 copies, or the prices of Ergonome's books that Compaq stole to avoid paying.

2. The District Court Forbade Any Reference to the Purposes of SCG, Namely, Prevention of RSI and RSI Lawsuits Against Compaq.

Immediately prior to trial, Compaq filed another motion in limine, asking that the district court forbid any reference in the presence of the jury to Repetitive Stress Injury and RSI lawsuits against Compaq.

The full title of Ergonome's book is "Preventing Computer Injury: The HAND Book". It is self-evident that this title states the reason for the existence of THB — its very purpose. The purpose of Compaq's "Safety & Comfort Guide" is generally evident from its title as well, but for more specificity as to the "Safety" component of the SCG, one only need look at the first page inside the front cover. This page is reproduced at App. P, p. 144a. It is replete with language warning Compaq computer users about the dangers of "carpal tunnel syndrome, tendinitis, tenosynovitis, numbness, tingling, throbbing, burning, soreness, aching in the hands, wrists, arms, or neck ...". In addition to preventing injuries to its customers, as Compaq's Manager of E-Commerce, Douglas James, stated in his deposition quoted *supra* and at App. O, pp.

142a-143a, Compaq was motivated to create the SCG by a desire to prevent potential injury to its own financial health caused by the RSI lawsuits filed against it.

Thus the purposes of both THB and SCG were clearly known to everyone associated with the trial — except the jury. On June 28, 2001, three days before trial, the district court granted Compaq's motion in limine regarding any reference to repetitive stress injury. App. G, p. 47a. The district court stated that evidence of Compaq's purposes for creating the SCG would be overly prejudicial. See App. V, June 28, 2001 Pretrial Hearing Transcript, at 181a-188a. The district court concluded:

> "(THE COURT:) ... It doesn't make any difference why they wanted to develop it. They developed it. ... It doesn't make any difference why they wanted to do it. ... They did it." *Id* at 187.

In sum, the district court held before trial that it didn't matter why Compaq copied, how many times it copied, or how much money it saved by copying. The jury was blindfolded to all of this. Lacking any substantive knowledge of the actual purpose and character of Compaq's use, it found for Compaq on its fair use affirmative defense[4]. Ergonome had been permitted to prove infringement, and it did, but it had been forbidden to show that the infringement had any value.

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[4] Because of incorrect instructions in the court's charge, the jury also found for Compaq on its *de minimis* contention. The incorrect *de minimis* instructions were 1) a refusal by the court to inform the jury that *de minimis* copying is the obverse of substantially similar copying, and 2) an instruction to the jury that it should "tak(e) into consideration prior similar expressions" when considering *de minimis*. See the Court's Instructions to the Jury, App. J, pp. 70a-71a. This instruction directly contradicts the Court's explanation in *Feist v Rural Telephone Services Company, Inc.*, 499 U.S. 340, 345 (1991) that originality, not novelty, is the touchstone of copyright.

REASONS FOR GRANTING THE WRIT

A. Introduction.

This case lies in a region beyond the previously known outer limits of fair use. 32,236,510 substantially similar copies of a copyrighted publication were found by both the Texas district court and the Fifth Circuit to qualify for the 17 U.S.C. § 107 fair use exception to the copyright holder's exclusive rights to prepare derivative works under 17 U.S.C. § 106, in spite of the fact that the copies were made and commercially distributed after the copier had solicited, received and rejected a quantity discount price from the copyright owner.

In arriving at these conclusions, the district court and the Fifth Circuit decided important federal questions in ways which necessarily conflict with relevant decisions of this Court, in particular with *Harper & Row, supra*. Concomitantly, they brought themselves into direct conflict with several of the other Circuits, especially with the Second as exemplified by and cited in *On Davis v. The Gap, Inc.*, 246 F.3d 152 (2nd Cir. 2001).

In *Harper, supra,* at 566, the Court stated that the fourth statutory fair use factor — "the effect of the use upon the potential market for or value of the copyrighted work" — is "undoubtedly the single most important element of fair use", and indeed it is so in this case. The district court held that Compaq was exempt from actual damages because Ergonome could not show that the 32,236,510 infringing copies had deprived it of sales to third parties, and the Fifth Circuit held that Compaq was entitled to prevail on the fourth fair use factor for the same reason. In so holding, the Fifth Circuit endorsed exactly what the Second Circuit excoriated in *On Davis* as an "illegal taking for free". 246 F.3d at 164.

These circuit conflicts have momentous implications and consequences for the application of both fair use and actual damages pursuant to 17 U.S.C. §§ 106/107 and § 504, and require resolution by the Court.

This petition also asks how a $2.7 million sanction against the author of the infringed work for a non-existent "discovery abuse", which is in direct conflict with the Ninth Circuit's holding in *3d, Ltd. v. Spectratek Technologies, Inc.*, No. 01-56604, 2002 U.S. App. Lexis 15057 (9th Cir. 2002), can be consistent with the purposes of the Copyright Act.

B. The Court Should Grant Review to Determine Whether the Current Contours of Fair Use Permit an Infringer to Make and Commercially Distribute 32,236,510 Copies of a Copyrighted Work.

1. The Rulings of the District Court Contain No Explanation of Its Fair Use Finding.

The district court's Amended Final Judgment of no copyright infringement does not mention fair use at all. App. C, pp. 23a-24a. Ergonome moved post trial to disregard the fair use finding. App. N, pp. 128a-132a. The district court's response was simply to say that it had denied Ergonome's mid-trial motion for JMOL on fair use, and that "its previous order stands". App. E, 37a. The "previous order" was an oral denial of an oral motion, also with no analysis. Thus there is no explanation from the district court of its judgment of fair use.

2. The Fifth Circuit's Analysis of Fair Use.

In analyzing Ergonome's appeal of the district court's judgment of fair use, however, the Fifth Circuit attempted to created a rationale for the judgment. The Fifth Circuit's analysis is at App. A, pp. 4a-10a. It recites the four statutory fair use factors, and then speculates on what the jury might have thought when applying them to the facts.

3. The Court Should Grant Review to Resolve the Question of Whether Fair Use Can Be Affirmed When a Jury Has Been Denied All Evidence of the Specific Commercial Purpose and Character of the Use.

The Court's explanation of "commercial" use and its relative significance under the first fair use factor in 17 U.S.C. § 107[5] has unfolded chiefly from three cases over the past 20 years:

Sony Corporation Of America, et al. vs. Universal City Studios, Inc., etc., et al., 464 U.S. 417 (1984)

Harper & Row v. Nation Enterprises, 471 U.S. 539 (1985)

Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994)

In *Sony*, the Court held that "...every commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright ...". 464 U.S. 450. In *Harper*, *Sony*'s standard of presumptive unfairness was tempered somewhat: "The fact that a publication was commercial as opposed to nonprofit is a separate factor that tends to weigh against a finding of fair use." 471 U.S. 562. Then in *Campbell*, *Sony* was further explained thusly:

> Sony stands for the proposition that the "fact that a publication was commercial as opposed to nonprofit is a separate factor that tends to weigh against a

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[5] The relevant portions of 17 U.S.C./106 and 107, including the four statutory fair use factors, are set forth fully at App. I, pp. 57a-58a.

finding of fair use." 471 U.S., at 562 . But that is all. and the fact that even the force of that tendency will vary with the context is a further reason against elevating commerciality to hard presumptive significance.

510 U.S. 575

Thus, under the current state of the law. commercial context, rather than commerciality *per se*, is the benchmark by which the significance of commercial use must be measured. In defining what constitutes "commercial use" in *Harper*, the Court stated, "The crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price." (emphasis added) 471 U.S. 562.

The Fifth Circuit's analysis of the first of the four fair use factors states that "Ergonome's substantial rights were not affected by the exclusion"[6] of all evidence of the specific purpose and character of the use, including the number of infringing copies, the customary prices of Ergonome's books, and the actual value to Compaq of the taking, which was as insurance against keyboard-injury product liability litigation.

The question which the Court should resolve in this context is, when 32,236,510 substantially similar copies of a work subject to the protections of 17 U.S.C. § 106 are made and commercially distributed because the copier does not like the owner's prices, can the first fair use factor favor the infringer when the evidence of both the "commercial context" mandated in *Campbell* and the "customary price" required by *Harper* are withheld from the jury pursuant to FRE 403?[7]

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[6] See Fifth Circuit Opinion, App. A, pp. 7a-8a.

[7] Federal Rules of Evidence, Rule 403, is reproduced at App. I, p. 60a.

4. The Court Should Grant Review to Resolve the Conflict Between the Second and the Fifth Circuits Concerning the Question of Whether An Infringer Can Escape Liability and Actual Damages If the Infringement Did Not Deprive the Owner of Sales to Third Parties.

The fourth and final fair use factor, "the effect of the use upon the potential market for or value of the copyrighted work", is closely connected in this case with the first factor, relating to the commercial nature of Compaq's usage. In *Harper, supra*, Justice O'Connor quoted Justice Story's original enunciation of this principle, saying, "... [T]he fair use doctrine has always precluded a use that 'supersede[s] the use of the original.'" *Harper*, 471 U.S. at 550.

The Fifth Circuit stated, "In this case, Ergonome could not show that the distribution of Compaq's SCG deprived Ergonome of any sales. ... The jury could also have reasonably concluded that Compaq's use of portions of THB had little or no impact on the potential market." App. A, p. 10a.

The question in this instance is, then, when a copier solicits and receives a quantity discount price for a copyrighted work to be distributed for the commercial purposes described above, and then, admittedly not liking the stated price, proceeds to make and distribute tens of millions of substantially similar copies rather than buying the original, are the tens of millions of copies to be deemed a superseding, usurpative market substitute for purposes of analysis under the fourth fair use factor (and damages), or are they to be excused because the copyright holder could not show that the consumption by the copier of the 32,236,510 copies had deprived the copyright holder of sales to third parties?

Compaq says that it did no damage to Ergonome's market, and both Judge Harmon and the Fifth Circuit agreed, but the fact is that Compaq was Ergonome's market. By printing and distributing 32.236.510 substantially similar copies of Ergonome's book, Compaq filled its own needs, which were for products liability insurance.

To premise liability and damages for Compaq's consumption of 32,236,510 substantially similar copies on losses of sales by Ergonome to third parties is to say that the thief in the orchard is only liable for the apples he sells, not the ones he eats. It is not so in common law, and it cannot be so in copyright law.

In *On Davis, supra*, this subject was exhaustively analyzed by Judge Leval in the context of actual damages pursuant to 17 U.S.C. 504(b) (statute reproduced at App. I, p. 59a). The entire *On Davis* opinion is commended to the Court, but particularly for the following analysis:

> The question is as follows: Assume that the copyright owner proves that the defendant has infringed his work. He proves also that a license to make such use of the work has a fair market value, but does not show that the infringement caused him lost sales, lost opportunities to license, or diminution in the value of the copyright. The only proven loss lies in the owner's failure to receive payment by the infringer of the fair market value of the use illegally appropriated. Should the owner's claim for "actual damages" under § 504(b) be dismissed? Or should the court award damages corresponding to the fair market value of the use appropriated by the infringer?
>
> Neither answer is entirely satisfactory. If the court dismisses the claim by reason of the owner's failure to prove that the act of infringement cause economic harm, the infringer will get his illegal taking for free, and the owner will be left

> uncompensated for the illegal taking of something of value. On the other hand, an award of damages might be seen as a windfall for an owner who received no less than he would have if the infringer had refrained from the illegal taking. In our view, the more reasonable approach is to allow such an award in appropriate circumstances.[8]

On Davis, 246 F.3d 164

In opposition to Judge Leval's holding in *On Davis*, the Fifth Circuit states in *Ergonome* that unless third party sales are lost to the infringement, the fourth fair use factor favors the infringer. App. A, p. 10a. This holding of the Fifth Circuit carries virtually dispositive weight in light of the Court's explanation in *Harper* that "This last factor is undoubtedly the single most important element of fair use." *Harper* at 566. The Court should grant certiorari to resolve this conflict between the Second and Fifth Circuits.

C. The Court Should Invoke Its Supervisory Powers to Review the Derivative Discovery Sanction of $2.7 Million Against Brown and the Holdings of Contempt Against Brown and Mowrey.

1. The Ninth Circuit Has Held That Awarding Attorneys' Fees as a Discovery Sanction Does Not Advance the Purposes of The Copyright Act.

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[8] Ironically, Judge Harmon relied almost wholly on *On Davis* (but in actual contradiction to its holding) as her rationale for denying Ergonome the opportunity to present evidence of actual damages to the jury. See June 29, 2001 Pretrial Hearing Transcript, App. M, p. 103 *et seq.*

The United States Constitution. Article I. § 8. Clause 8, confers upon Congress the Power:

> To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.

The Ninth Circuit has specifically stated that an award of attorney's fees as a discovery sanction would not advance these purposes:

> Although we reject 3D's claims, we do not find them frivolous or objectively unreasonable. ... 3D's discovery infractions do not alone justify the award. Awards of attorney's fees under 17 U.S.C. § 505 must advance the purposes of the Copyright Act. Fantasy, Inc. v. Fogerty, 94 F.3d 553, 558 (9th Cir. 1996). An award based solely on discovery violations would not do so to any material degree.

3d, Ltd. v. Spectratek Technologies, Inc., No. 01-56604, 2002 U.S. App. Lexis 15057 (9th Cir. 2002)[9]

The specific, on-point conflict between the Ninth Circuit in *3d, Ltd.* and the Fifth Circuit's affirmation of the $2.7 million attorneys' fees discovery sanction against Brown, the author of the infringed work, is a further reason that the Court should grant certiorari. If, as stated by the Ninth Circuit, such a sanction does not advance the purposes of the Copyright Act — and, self-evidently, it does exactly the opposite — then the sanction against Brown should be reversed on this ground alone.

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[9] Although *3D, Ltd.* is unpublished, it is brought to the Court s attention because it is the only prior known case in which attorneys fees have been awarded as a discovery sanction in a copyright infringement action.

2. The Alter Ego Discovery Was Fully and Timely Produced Even Though There Was No Pleading of Fraud to Support Its Request.

Approximately 40 percent of the Fifth Circuit's 25-page opinion is devoted to excoriating Ergonome, Mowrey, and, in particular, Brown, stating that their "... discovery abuse is among the worst we have seen." App. A, p. 16a. The "discovery abuse" was wholly a contrivance of Compaq to avoid producing any discovery itself.[10] The district court permitted the contrivance, and the Fifth Circuit gave its *imprimatur*, apparently without analyzing the relevant facts and law.

The Fifth Circuit panel states that "The [discovery] dispute began in 1998, when the district court ruled that Compaq would be given an opportunity to pierce the corporate veil to provide a jurisdictional basis for joining Brown as a party to Compaq's declaratory judgment action."

On September 5, 1997, following jurisdictional discovery and the first depositions of Mowrey and Brown, Compaq stated in its briefing, "First, it should be noted that Ms. Brown is not a necessary party. Although she is the purported author of The HAND Book, she has conveyed all her rights in that work to Defendant Ergonome."

The primary question to be addressed in this context is, what is the legal basis for seeking personal jurisdiction over someone who is "not a necessary party"? As Compaq itself stated on September 5, 1997, Brown was not a proper party to the suit on the basis that she personally owned the copyright, because she no longer owned it. On what other basis could she have been properly joined then?

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[10] During the first three-and-one-half years of the litigation, Ergonome and Brown produced more than 13,000 documents and Mowrey and Brown submitted to five days of depositions. During that time, Compaq refused, with the district court's approval, to produce a single document or witness.

Alter ego "for jurisdictional purposes" was what Compaq alleged, but once Compaq had personal jurisdiction over her, then what? The cause of action against her as copyright owner had been dismissed by Compaq itself on September 5, 1997. The only thing that would have been left, after obtaining personal jurisdiction through alter ego, would have been to plead liability through alter ego.

In his specially concurring opinion, Judge Pickering points out that " ... at least eighteen months before the sanction was imposed, Compaq made it clear to the Ergonome defendants that it was seeking alter ego liability as to Brown for attorney's fees." App. A, p. 18a. It was indeed clear from the beginning that Compaq sought Brown's liability through alter ego. The liability pursuit was disguised as a quest for personal jurisdiction because Compaq could not make the pleading of fraud which is required for alter ego liability in both Texas and New York. Because the pleading was never made, the discovery itself was improper. Judge Harmon simply refused to follow Texas and New York statutes and ironclad Fifth and Second Circuit caselaw in this regard. In spite of the meticulous, step-by-step explanation of this in the appeal of Brown and Mowrey, Judge Pickering took no cognizance of it either.

3. The Interrogatory Answers Which Brown Gave in July and August, 1999, Were Fully Sufficient Under Fed. R. Civ P. 33.

The Fifth Circuit panel states that "The district court's discovery sanction finds its roots in Brown's repeated refusal to respond adequately to interrogatories aimed at proving alter ego." App. A, p. 13a. "In the face of all this, Ergonome and Brown only provided cursory answers." *Id*, p. 24. The simple fact is, however, that Brown answered the interrogatories with full legal sufficiency when they were first propounded. The record is as follows:

The first interrogatory asked Brown to "Describe in detail all instances since the date Ergonome was incorporated where the requirements of the New York Business Corporation Law have not been met." On July 28, 1999, Brown responded in relevant part as follows:

> [T]here was a brief period during which Ergonome was delinquent in payment of its franchise taxes. These taxes were later paid by Ergonome and Ergonome was returned to good standing with the New York Secretary of State.

Compaq claimed that this answer was insufficient. Accordingly, on August 4, 1999, Brown supplemented her answer, adding the following language to her previous response: "The exact dates of these transactions are reflected in the corporate records of Ergonome which have been produced previously."

The second interrogatory asked Brown to "Describe in detail all creditors or service providers of Ergonome, such as banks, utility companies, courier services, and all instances where debts or obligations of Ergonome have been paid or satisfied by Brown or a third party." On July 28, 1999, Brown responded in relevant part as follows:

> Ms. Brown does not know of any instances described in this interrogatory ... but believes that if any such instances existed, it would be reflected in the check registers of Ergonome which are being produced contemporaneously herewith.

The third interrogatory asked Brown to "Describe in detail all instances where debts or obligations of Brown or any third party have been paid or satisfied by Ergonome." On July 28, 1999, Brown responded in relevant part that "no such instances are known to have occurred." On August 4, 1999, Brown elaborated in relevant part as follows:

> [N]o such instances are known to have occurred, except to the extent that certain payments were made directly to Ms. Brown's creditors rather than to Ms. Brown. Each of these exceptional instances is reflected in the check registers of Ergonome and in the tax worksheets and loan reconciliation documents.

These are the answers to the three interrogatories which Brown gave in July and August, 1999, when they were first propounded. Compaq referred to them as "cursory", and the district court and Fifth Circuit agreed. The answers may be short, but are they insufficient?

In them, Brown says that she does not know of any "such instances". She could not have invented some simply because Compaq wished there had been some. In each instance, she then went on to refer Compaq to the books and records produced where, if any such instances actually had occurred, they would be found. Compaq's response was that it should not have to be "burdened" with poring through Ergonome's and Brown's documents.

However, this "burden" was not imposed on Compaq by Ergonome or Brown, but rather, by Congress in Fed. R. Civ P. 33 (d): "Where the answer to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served ... it is a sufficient answer to such an interrogatory to specify the records from which the answer may be derived or ascertained ..." (emphasis added). App. I, p. 60a.

Brown could not have answered other than she did. She did not know of any "such instances". but she referred Compaq to the records where they would be found if there were any, in precise compliance with Fed. R. Civ P. 33 (d).

For these fully sufficient answers to Compaq's interrogatories, Brown was held in contempt. App. F, p. 40a. For the same fully sufficient answers, she was held to be the alter ego of Ergonome. App. H, p. 51a. As a derivative of the alter ego holding, she was sanctioned $2.7 million. App. C, pp. 23a-24a.

Mowrey was held in contempt for not answering the same interrogatories. App. F, p. 40a. Apparently neither the district court nor the Fifth Circuit noticed that Compaq had never asked him to answer them.

The holdings of the district court and the Fifth Circuit in this instance constitute such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power.

CONCLUSION

For all of the foregoing reasons, petitioners respectfully request that the Supreme Court grant review of this matter.

Respectfully submitted,

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APPENDIX

APPENDIX A

United States Court of Appeals
Fifth Circuit
FILED
October 5, 2004
Charles R. Fulbruge III
Clerk

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 01-20861

COMPAQ COMPUTER CORPORATION,
Plaintiff-Counter-Defendant-Appellee,

versus

ERGONOME INCORPORATED,
Defendant-Counter-Claimant-Appellant,

STEPHANIE L. BROWN; THOMAS W. MOWREY,
Defendants-Appellants.

ERGONOME INCORPORATED; ET AL.,
Plaintiffs,

ERGONOME INCORPORATED,
Plaintiff-Appellant,

versus

COMPAQ COMPUTER CORPORATION,
Defendant-Appellee.

Appeals from the United States District Court
For the Southern District of Texas

Before JONES, DENNIS, and PICKERING, Circuit Judges.

EDITH H. JONES, Circuit Judge:

This case arises from Ergonome's claim that Compaq's Safety and Comfort Guide ("SCG") unlawfully infringed on a copyright held by Ergonome in Preventing Computer Injury: The HAND Book ("THB"), a teaching text describing ergonomically correct hand positions for computer users and ways to avoid repetitive stress injuries. On July 11, 2001, after a seven-day trial, the jury concluded that any copying by Compaq was de minimis and constituted fair use according to 17 U.S.C. § 107. The district court subsequently held that the doctrines of laches and equitable estoppel also barred Ergonome's claim. Based on these findings, the district court awarded Compaq its attorneys' fees of $2.7 million. Additionally, the district court deemed defendant Stephanie Brown to be the alter ego of Ergonome as a sanction for repeated discovery violations throughout the litigation process.

Ergonome, Brown, and her husband Mowrey appeal on multiple grounds and argue, inter alia, that (1) the jury's verdict should be set aside, (2) the district court erred in finding that laches and equitable estoppel bar their suit, (3) the district court erred in shifting attorneys' fees to Ergonome, and (4) Brown and Mowrey are not the alter egos of Ergonome and should not be held jointly and severally liable for the attorneys' fee award.

To prevail, Ergonome would have to persuade this court that each of the four independent bases for finding in Compaq's favor (de minimis, fair use, laches, and equitable estoppel) is legally erroneous. Ergonome has not succeeded in this formidable task, and, focusing exclusively on the jury's finding of fair use, we affirm the finding of no infringement. We reach no other substantive copyright issues raised by the parties. Additionally, we affirm the district court's decision to shift attorneys' fees and its discovery sanction against Brown. However, because no such sanction was imposed on Mowrey, we reverse this aspect of the judgment.

I. BACKGROUND

In 1992, Stephanie Brown began writing THB and subsequently registered the manuscript with the U.S. Copyright Office. Brown and Mowrey formed Ergonome in 1993 to publish and market the book. Brown assigned all her rights in THB, including the copyright, to Ergonome. THB was formally published in 1994.

In 1993, Compaq decided to update a booklet entitled Creating a Comfortable Work Environment that was packaged with each Compaq computer. During the revision process, Compaq's manager of the Human Factors Group, Cynthia Purvis, referenced THB. The finished booklet, renamed the Safety and Comfort Guide, contained four illustrations and seven phrases that were similar to photographs and phrases in THB.[1] Like its predecessor, the SCG was packaged and included with every Compaq computer.

Meanwhile, Brown and Mowrey had been attempting to market THB to various computer companies, including Compaq. Mowrey initially spoke to

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[1] For example, the SCG contained a hand-drawn illustration of a computer-user's hands, angled wrists, and lower arms positioned over a keyboard, with a caption below reading "Angled-Wrist Position - Incorrect." THB contained a similar photograph with a caption reading "Angled-wrist position - No."

Purvis on the telephone in March 1994 and thereafter sent Purvis a letter detailing volume discount prices for THB. In November 1994, Brown and Mowrey attended a meeting with Compaq personnel in Houston to demonstrate Key Moves, a software derivative of THB. During this meeting, Purvis gave Brown a pre-publication copy of the 1994 SCG. According to Brown, while leafing through the SCG, she became aware of the similarities between the above-referenced four illustrations and seven phrases and THB. She said nothing of the alleged infringement, however, choosing instead to pursue the possibility of a software license with Compaq. Brown and Mowrey returned to Compaq again in January 1995 for another Key Moves demonstration.

In December 1996, Mowrey notified Purvis of Ergonome's infringement claims. In 1997, Compaq filed suit in federal district court in Houston seeking a declaration that the SCG did not infringe on THB. Ergonome subsequently filed an infringement action in federal district court in New York, which was transferred and consolidated with Compaq's declaratory judgment action in Houston. Both parties filed motions for summary judgment, and the district court concluded as a matter of law that the portions of THB at issue were copyrightable. However, the district court ultimately denied the motions because genuine issues of material fact remained as to Compaq's affirmative defenses of de minimis and fair use. See Compaq Computer Corp. v. Ergonome, Inc., 137 F.Supp. 2d 768 (S.D. Tex. 2001). The jury trial and resulting appeal followed.

II. DISCUSSION

A. Liability

"To establish copyright infringement, a plaintiff must prove ownership of a valid copyright and copying of constituent elements of the work that are copyrightable." Eng'g Dynamics, Inc. v. Structural

Software, Inc., 26 F.3d 1335, 1340 (5th Cir. 1994) (citing Feist Publications, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 361 (1999)). Copyright ownership is shown by (1) proof of originality and copyrightability and (2) compliance with the applicable statutory requirements. Id. Compaq does not dispute that Ergonome possessed a statutorily compliant copyright. In addition, the district court held as a matter of law that the portions of THB allegedly copied by Compaq reflected the necessary originality to qualify as copyrightable.[2] Compaq Computer Corp. v. Ergonome Inc., 137 F. Supp. 2d 768, 777 (S.D. Tex. 2001). The jury found that Compaq actually copied portions of THB.

Not all copying amounts to copyright infringement, however. Eng'g Dynamics, 26 F.3d at 1340-41. Specifically, Congress has excepted from infringement of copyrighted materials copying that amounts to "fair use" under 17 U.S.C. § 107. When determining fair use, Congress has provided a non-exclusive list of factors that must be considered:

> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
> (2) the nature of the copyrighted work;
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
> (4) the effect of the use on the potential market for or value of the copyrighted work.

17 U.S.C. § 107 (2000). In the instant case, Compaq pleaded fair use as an affirmative defense, the jury was instructed on the four factors enumerated above, and

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[2] Ergonome argues that the district court allowed Compaq to relitigate the question of originality and copyrightability. However, the jury was instructed that THB was "a copyrighted work subject to the protection of the Copyright Act." Ergonome's argument is wrong.

they ultimately concluded that Compaq's copying of the four illustrations and seven phrases from THB amounted to fair use. On appeal, Ergonome does not challenge the fair use jury instruction. Instead, the company argues that the district court erroneously excluded evidence relevant to the fair use defense and erred in refusing to grant Ergonome's motion for judgment as a matter of law as to fair use.

1. Exclusion of Evidence

This court reviews a district court's decision to admit or exclude evidence for abuse of discretion. Green v. Admin's of Tulane Educ. Fund, 284 F.3d 642, 660 (5th Cir. 2002). Even if an abuse of discretion is found, the harmless error doctrine applies unless a substantial right of the complaining party was affected. Id.

Ergonome contends that the district court excluded evidence relevant to the first statutory fair use factor. Specifically, Ergonome complains about the exclusion of evidence relating to (1) past lawsuits against Compaq for repetitive stress injuries ("RSI"), (2) the exact number of the offending copies of the SCG distributed with Compaq computers, and (3) the proposed volume discount quoted to Compaq by Mowrey. The district court apparently premised exclusion on Federal Rule of Evidence 403, finding that "its probative value is substantially outweighed by the danger of unfair prejudice." FED. R. EVID. 403.

Ergonome asserts that the evidence concerning past RSI lawsuits is necessary to prove Compaq's "commercial motive" for copying from THB, that is, Compaq's desire to defray potential RSI liability. The first statutory fair use factor asks the court or jury to consider "the purpose or character of the use." While Compaq did not produce the SCG for individual sale or profit, the Supreme Court has noted that "[t]he crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price." Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 562, 105 S. Ct. 2218, 85 L. Ed. 2d 588 (1985). Thus, the inclusion of the SCG with each Compaq computer constitutes a commercial use of the copied material.

The RSI evidence would be relevant to Ergonome's "motive" theory. However, the district court concluded that Ergonome's true reason for seeking to introduce the evidence was to paint Compaq as a "bad" company. The court did not abuse its discretion by concluding that any probative value the RSI evidence might hold was outweighed by its prejudicial and inflammatory nature and by its tendency to confuse the jury with tangential litigation. In any event, the exclusion was harmless, because even without the RSI lawsuit evidence, the jury was presented with ample evidence of Compaq's commercial use, or "motive," relevant to the first statutory fair use factor.

Ergonome also contests the exclusion of the number of 1994 Compaq guides distributed to customers and evidence concerning the details of a proposed volume discount price submitted by Mowrey.[3] Such evidence is claimed to be relevant to Compaq's commercial use of THB under the first statutory fair use factor. The district court did not abuse its discretion by excluding this evidence as cumulative or prejudicial. See FED. R. EVID. 403. Again, any error that may have occurred was harmless, as Compaq's commercial use of THB was evident from the fact that a copy of Compaq's SCG was bundled with every Compaq desktop computer sold, and the jury was aware that Compaq sold millions of computers. The jury was also apprised of Ergonome's desire to sell THB to Compaq and of the sales calls and meetings to that end. Ergonome's substantial rights were not affected by the exclusion of this evidence.

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[3] Ergonome asserts that 32,236,510 copies of the SCG were produced. Additionally, Mowrey suggested a volume discount price of $7.95 per copy for orders of THB over 100,000.

2. Judgment as a Matter of Law

We review a district court's ruling on a motion for judgment as a matter of law de novo. Ins. Co. of N. Am. v. Aberdeen Ins. Servs., Inc., 253 F.3d 878, 884 (5th Cir. 2001). This court views the evidence and inferences drawn therefrom in the light most favorable to the nonmoving party. Id. Judgment as a matter of law is appropriate only when the "facts and inferences point so strongly and overwhelmingly in favor of one party that the [c]ourt believes that reasonable men could not arrive at a contrary verdict." Rubinstein v. Admin's of the Tulane Educ. Fund, 218 F.3d 392, 401 (5th Cir. 2000); see also FED. R. CIV. P. 50(a).

Ergonome argues sketchily that the evidence as to each of the four non-exclusive statutory fair use factors points so overwhelmingly in Ergonome's favor that the district court erred in denying its motion for judgment as a matter of law. As discussed supra, Compaq's use of THB was commercial in the sense that Compaq's SCG was packaged with every desktop computer. While commerciality generally weighs against finding fair use, it does not end the inquiry; rather, the fair use determination depends on the totality of the factors considered. See Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 584, 114 S. Ct. 1164, 1174, 127 L. Ed. 2d 500 (1994); Sundeman v. Seajay Soc'y, Inc., 142 F.3d 194, 203 (4th Cir. 1998).

The second statutory factor asks the factfinder to determine "the nature of the copyrighted work." The Supreme Court has noted that "fair use is more likely to be found in factual works than in fictional works." Stewart v. Abend, 495 U.S. 207, 237, 110 S. Ct. 1750, 1769, 109 L. Ed. 2d 184 (1990). Ergonome argues that because the district judge found at summary judgment that portions of THB were sufficiently original to warrant a copyrightability finding, the second factor must favor Ergonome. In order to be copyrightable. a work must contain a certain modicum of originality. Originality's relatively low hurdle may be cleared when the "selection and arrangement" of sometimes uncopyrightable facts evinces a "minimal degree of creativity." Feist Publications, Inc. v. Rural Tel. Serv. Co., Inc., 499 U.S. 340, 345, 111 S. Ct. 1282, 1287, 113 L. Ed. 2d 358 (1991). At summary judgment, the district court concluded that THB possessed the requisite amount of originality.

Ergonome's argument proves too little, however, because fair use excuses otherwise actionable infringement. Thus, a work will always be found "original" for copyrightability purposes before the fair use analysis is applied. The second statutory fair use factor, then, refers to the "nature" of the work beyond this initial inquiry. At trial, Brown herself stated that THB was a factual teaching text. Based on the evidence submitted at trial, the jury could have easily concluded that THB was a factual work, as opposed to a highly creative fictional work, and that the second fair use factor favored Compaq.

The third statutory factor considers "the amount and substantiality of the portion used in relation to the copyrighted work as a whole." The copied portions of THB at issue in this case amount to four illustrations and seven phrases. The evidence at trial revealed that THB is approximately 100 pages long and contains over 88 photographs. Based on the evidence adduced at trial, the jury could have reasonably concluded that the minimal portions of THB used in Compaq's SCG were insubstantial in relation to THB as a whole.

Finally, the Copyright Act focuses on "the effect of the use on the potential market for or value of the copyrighted work." The Supreme Court states that this factor represents the most important aspect of fair use. Harper & Row, 471 U.S. at 566, 105 S. Ct. at 2233. This factor requires courts to consider not only actual harm to the market for the original, but also whether widespread use of the work, like the sort complained of by the copyright-holder, would impair the potential market for the original work and any derivative works. Campbell, 510 U.S. at 590, 114 S. Ct. at 1177.

In this case, Ergonome could not show that the distribution of Compaq's SCG deprived Ergonome of any sales. In fact, Brown and Mowrey conceded that in June 1994, six months before Compaq began distributing its SCG, they decided to cease actively marketing THB. Mowrey testified that because of the increased demand for computer software, he and Brown decided to focus on marketing Key Moves as opposed to THB. In addition, he stated that it was simply too easy for company managers to read THB and instruct employees on its techniques rather than buy numerous copies of the book. Based on this evidence, the jury could have reasonably concluded that the distribution of Compaq's SCG had little or no impact on the market for THB. Moreover, Mowrey stated that the potential market for THB was essentially thwarted by an uncontrollable market phenomenon, namely, managerial consumption and dissemination of THB techniques. The jury could also have reasonably concluded that Compaq's use of portions of THB had little or no impact on the potential market. The evidence presented at trial and the reasonable inferences therefrom, when viewed through the lens of the statutory fair use factors, support the jury's fair use finding.[4]

B. Attorneys' Fees

The Copyright Act provides that

> [i]n any civil action under this title, the

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[4] Because we uphold the jury's fair use finding, which in turn results in a finding of no infringement, we have no occasion to address Ergonome's other claims on appeal relating to liability and damages.

> court in its discretion may allow the recovery of full costs by or against any party other than the United States or an officer thereof. Except as otherwise provided by this title, the court may also award a reasonable attorney's fee to the prevailing party as part of the costs.

17 U.S.C. § 505 (2000). As the prevailing party, Compaq requested an award of attorneys' fees. In granting Compaq's request for attorneys' fees of $2,765,026.90, the district court relied upon several factors, inter alia: (1) Ergonome continuously failed to comply with discovery orders, which resulted in monetary sanctions and holdings of contempt; (2) Ergonome filed a multitude of "nonmeritorious motions;" and (3) had Ergonome prevailed on its $800 million claim for damages, its attorneys would have received a forty percent contingent fee, which represents an award 120 times greater than the amount requested by Compaq. Appellants argue that the district court's decision to award attorneys' fees to Compaq violates Supreme Court precedent and also represents an abuse of discretion. They do not, however, contest the quantum of the fee award.

Whether the district court applied an incorrect legal standard in awarding attorneys' fees is a question of law reviewed de novo. Hogan Sys., Inc. v. Cybresource Int'l, Inc., 158 F.3d 319, 325 (5th Cir. 1998). We review a district court's decision to award attorneys' fees, however, for abuse of discretion. Id.

In deciding to award attorneys' fees, the district court noted that "[t]he Fifth Circuit has acknowledged that an award of attorneys' fees in copyright cases is within the discretion of the trial court, but has held that the award of attorneys' fees in copyright cases is the rule rather than the exception, and should be awarded routinely." See Hogan, 158 F.3d at 325; McGaughey v. 5 Twentieth Century Fox Film Corp., 12

F.3d 62, 65 (5th Cir. 1994). Appellants argue that the Supreme Court's decision in Fogerty v. Fantasy, Inc., 510 U.S. 517, 114 S. Ct. 1023, 127 L. Ed. 2d 455 (1994), displaced this court's "discretionary but routinely awarded" standard.[5] This argument is without merit. In Hogan, this court considered and rejected the identical argument advanced by Appellants here. 158 F.3d at 325. Specifically, this court held that both this circuit's rule and the Fogerty rule allow for district court discretion in the decision to award attorneys' fees. Id. The district court did not apply the incorrect legal standard.

Appellants also argue that the district court failed to apply the correct factors, as announced in Fogerty, when making its decision. However, the Supreme Court in Fogerty stated that "[t]here is no precise rule or formula for making [a fee award determination] . . . ." 510 U.S. at 534, 114 S. Ct. at 1033. The factors that Appellants point to as being determinative (frivolousness, motivation, objective unreasonableness, and the need to advance considerations of compensation and deterrence) were indeed referenced by the Court, but only as factors that "may be used to guide courts' discretion." Id. at 535 n.19, 114 S. Ct. at 1033 n. 19. This court has already considered and rejected the idea that district courts are bound to apply verbatim the factors listed above. Hogan, 158 F.3d at 325-26. Additionally, the factors relied upon by the district court overlap with several of the factors advanced by Appellants, namely, motivation, objective unreasonableness, and compensation. The district court did not apply the incorrect legal standard.

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[5] In Fogerty, the Supreme Court rejected the argument that Section 505 adopted the British Rule of awarding costs to the prevailing party as a matter of course and instead adopted an "evenhanded" approach that relied on the district court's discretion. 510 U.S. at 533-34, 114 S. Ct. at 1033.

Finally, we cannot say that the district court abused its discretion in awarding Compaq its attorneys' fees. The court examined both procedural and substantive aspects of the litigation in making its decision. The attorneys' fee award is affirmed.

C. Discovery Sanction

In its order amending the final judgment, the district court, as discussed supra, ordered "Ergonome" to pay Compaq's attorneys' fees. The court further defined "Ergonome" as "Ergonome, Inc., Stephanie L. Brown and Thomas Mowrey," thus holding Brown and Mowrey liable for the fee award. Brown and Mowrey were included in the collective definition of "Ergonome" following the district court's finding of alter ego as a discovery sanction.[6] The sanction was made pursuant to Federal Rule of Civil Procedure 37(b), which provides that when a party fails to comply with a discovery order, the court may "order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order." FED. R. CIV. P. 37(b)(2)(A). Brown and Mowrey challenge the court's alter ego discovery sanction, which we review for abuse of discretion. Tollett v. City of Kemah, 285 F.3d 357, 363 (5th Cir. 2002).

The district court's discovery sanction finds its roots in Brown's repeated refusal to respond adequately to interrogatories aimed at proving alter ego. The dispute began in 1998, when the district court ruled that Compaq would be given an opportunity to pierce the corporate veil to provide a jurisdictional basis for joining Brown as a party to Compaq's declaratory judgment action.[7] For over two years, Brown creatively refused to provide the discovery sought by Compaq.[8] Brown filed three unsuccessful petitions for writ of mandamus to this court, one motion requesting that the district judge recuse herself, one motion requesting that the district court refer the case to the U.S. Attorney for prosecution under the Hobbs Act, and finally, a bankruptcy case in New York, which the bankruptcy judge ultimately found was filed "to prevent potential liability of Ms. Brown in the event Compaq prevailed in the Houston litigation."

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[6] A finding that Brown and Mowrey are the alter egos of Ergonome results in their personal liability for the award of attorneys' fees.

On March 26, 2001, the district court held Ergonome, Inc., Brown, and Mowrey in contempt of court for failing to respond adequately to Compaq's discovery requests. While the court declined at that time to find that Brown was the alter ego of Ergonome as a matter of law, the court cautioned that if the discovery was not provided within thirty days, it would be "prepared to do so in light of Defendants' long history of filibuster and delay on the matter." In that same order, the court denied Brown's and Mowrey's motion for judgment on the pleadings, in which they argued the merits of the alter ego issue. The court noted that Brown and Mowrey were "ironically invoking the very doctrine on which they have been recalcitrant with regard to Compaq's discovery requests."

On July 16, 2001, five days after the trial, the district court entered a final judgment, declaring that Compaq's Safety and Comfort Guide did not infringe

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[7] Personal jurisdiction may be established over a corporate officer by establishing that the individual is an alter ego of a corporation over which the district court has established personal jurisdiction. See, e.g., Patin v. Thoroughbred Power Boats Inc., 294 F.3d 640, 653 (5th Cir. 2002). Because the corporation and its individual alter ego "are the same entity, the jurisdictional contacts of one are the jurisdictional contacts

[8] Compaq admits that a portion of the requested discovery was received in 1999, however, the remainder of the discovery requests went unanswered and was the subject of additional discovery orders by the district court.

Ergonome's The HAND Book and ordering that Compaq recover its costs from Ergonome. In that order, the district court referred to Ergonome, Inc., Stephanie L. Brown, and Thomas Mowrey collectively as "Ergonome." Brown and Mowrey moved to alter or amend the final judgment, asserting that they should be removed from the judgment because Ergonome's corporate veil was never pierced. The district court noted that the argument was simply a "re-urging of the same points in their Motion for Judgment on the Pleadings, which was denied March 26, 2001." The court further stated that, after the March 2001 order, Brown and Mowrey were given an opportunity to respond fully to the discovery requests. Additionally, the court reminded Brown of the March 2001 order warning her that any future failure to provide the requested discovery would result in a finding that she was the alter ego of Ergonome. Ultimately, the court granted Compaq's request and, as a sanction, held Brown to be the alter ego of Ergonome, Inc.

The Supreme Court has noted that rule 37(b)(2) "contains two standards — one general and one specific — that limit a district court's discretion." Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 707, 102 S. Ct. 2099, 2107, 72 L. Ed. 2d 492 (1982). "First, any sanction must be 'just'; second, the sanction must be specifically related to the particular 'claim' which was at issue in the order to provide discovery." Id. Based on the facts and circumstances surrounding the district court's decision, we conclude that the sanction was "just." Compaq struggled for well over two years to obtain sufficient alter ego discovery from Brown and Ergonome.[9] Brown and Ergonome engaged in abusive practices for the sole purpose of frustrating Compaq's ability to extract the discovery. The district court was not alone in its assessment of the delaying tactics. In denying Ergonome's third petition for writ of mandamus, this court warned that "[t]he mandamus petition is arguably frivolous and would entitle the opposing party to attorneys' fees." Additionally, the bankruptcy court found that Ergonome's suggestion of bankruptcy was filed solely to avoid potential liability in the Compaq litigation. The entire egregious course of overlitigation and discovery abuse is among the worst we have seen.[10]

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[9] Brown argues that her responses to Compaq's interrogatories were sufficient. However, although the supplemental answers filed on April 30, 2001, contain certain additional information not present in the earlier versions, those portions dealing with the relationship among Brown, Mowrey and Ergonome consist largely of rhetoric aimed at inflaming the opposing party. The district court did not abuse its discretion in

Second, the court's decision to deem Brown the alter ego of Ergonome was "specifically related to the particular 'claim' which was at issue in the order to provide discovery." Id. at 707, 102 S. Ct. at 2107. The purpose of the discovery, from its very inception, was to discover facts that would support a finding of alter ego. This finding, in turn, would result in piercing Ergonome's corporate veil. The district court's sanction of deeming Brown to be the alter ego of Ergonome corresponded to the "claim" at issue in Compaq's repeated discovery requests.[11] The result of this sanction — personal liability

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concluding that the responses did not satisfy the March 2001 order.

[10] It need hardly be added that the court warned Brown that failure to comply with the discovery order would result in a sanction of the type ultimately imposed. See id. at 707-08, 102 S. Ct. at 2106-07 (relying on similar factors to conclude that the sanction was "just").

[11] Brown argues that the district court failed to recognize the difference between alter ego for jurisdictional purposes and alter ego for liability purposes; she argues that because the discovery sought related only to personal jurisdiction, the district court's sanction affecting her personal liability amounted to an abuse of discretion.

Although it is true that Compaq originally sought the alter ego discovery to establish personal jurisdiction over Brown, the record supports the conclusion that by January for attorneys' fees — flows directly from the finding of alter ego. See Id. at 709, 102 S. Ct. at 2108 ("That a particular legal consequence . . . follows from [the discovery sanction], does not in any way affect the appropriateness of the sanction."). As a result, we cannot say that the district court abused its discretion in deeming Brown to be the alter ego of Ergonome and that portion of the order is affirmed. The district court's order, however, plainly fails to levy the same sanction against Mowrey. The order states: "As a sanction the Court will declare Brown to be the alter ego of Ergonome, Inc., and will deny the motion to alter or amend the final judgment." Thus, there is no legal basis for holding Mowrey to be the alter ego of Ergonome, Inc., and no corresponding basis for holding him personally liable for the attorneys' fees in question. Accordingly, we reverse that portion of the district court's order holding Mowrey personally liable for the attorneys' fee award.

III. CONCLUSION

For the reasons discussed above, the judgment in favor of Compaq is AFFIRMED, except insofar as the judgment holds Thomas Mowrey personally liable for the attorneys' fee award. The judgment against Mowrey is REVERSED.

AFFIRMED IN PART; REVERSED IN PART.

PICKERING, SR., CHARLES W., Circuit Judge, specially

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of 2000, at the very latest, Ergonome was aware of Compaq's desire to prove alter ego for the purpose of collecting attorneys' fees from Brown and Mowrey individually. Additionally, Compaq moved to amend its complaint on June 1, 2000, and specifically added an alter ego liability claim. This motion was unopposed. Finally, the district court warned Brown in March of 2001 that failing to comply with the discovery order would result in a finding of alter ego. Brown's protestations are unconvincing.

concurring.

I concur in the result but write separately because the attorney's fee sanction against defendant Brown has given me considerable pause and concern. The district court's finding alter ego *as a sanction* had the effect of imposing a $2.8 million attorney's fee on the individual defendant Brown. Our case law is very clear that we should not dismiss a cause of action as a sanction unless all other lesser sanctions have been considered and found ineffective. *Long v. Simmons*, 77 F.3d 878, 880 (5th Cir. 1996) ("A dismissal without prejudice is appropriate only if the failure to comply with the court order was the result of purposeful delay or contumaciousness and the record reflects that the district court employed lesser sanctions before dismissing the action."). That same rationale should be applicable in this case. Dismissing a complaint puts a plaintiff out of court without trial, and finding alter ego as a sanction, in this case imposed liability on a defendant without trial. One is the death sentence to a plaintiff. The other is the death sentence to a defendant.

The Ergonome defendants strenuously argue that plaintiffs were seeking alter ego discovery only for the purpose of jurisdiction and not for the purpose of liability. However, the record clearly reflects that at least eighteen months before the sanction was imposed, Compaq made it clear to the Ergonome defendants that it was seeking alter ego liability as to Brown for attorney's fees. Despite their argument to the contrary, the Ergonome defendants were on notice well before the sanction was imposed that Compaq was trying to obtain an award of attorney's fees against the individual defendant Brown on the basis of alter ego.

A sanction of this magnitude is a serious consequence and should not be imposed lightly. *See Roadway Express, Inc. v. Piper*, 447 U.S. 752, 767 (1980) ("sanctions . . . should not be assessed lightly or without a fair notice and an opportunity for a hearing on the record."). I write separately to emphasize the egregiousness of the litigation strategy of the Ergonome defendants, absent which I would not concur in this sanction.

The Ergonome defendants' litigation strategy can only be described as fitting the prototype of a trial strategy of extortion by unreasonably aggressive and obstructive litigation practices. In other words, they attempted to make the litigation so unpleasant and so costly that the defendants would be forced to settle.

On at least seven different occasions the trial court ordered Ergonome and Brown to comply with alter ego discovery. Additionally, the court ordered the Ergonome defendants to comply with these discovery requests within thirty days or face a $1,000 per day fine. Ergonome responded by filing a frivolous bankruptcy petition which was dismissed by the bankruptcy court on the ground that Brown was seeking to avoid the consequences of having attorney's fees assessed against her in this action. The trial court then levied a $34,000 sanction against Brown and her attorneys for failing to comply with discovery orders. Eventually the court advised Ergonome and Brown that if they did not comply with the alter ego discovery requests within thirty days, alter ego would be admitted as a discovery sanction. Yet in face of all of this, Ergonome and Brown only provided cursory answers. As a last resort, the trial court imposed the sanction of taking alter ego as having been established, the issue as to which Ergonome had stonewalled Compaq by failing to provide adequate discovery.

Additionally, Ergonome and Brown filed three meritless petitions for writs of mandamus to the Fifth Circuit in this litigation. A writ of mandamus is an extraordinary remedy that is rarely granted. *See In re Avantel, S.A.*, 343 F.3d 311, 317 (5th Cir. 2003). After the third writ of mandamus, the Fifth Circuit warned Ergonome and Brown that the petition was arguably frivolous and could entitle Compaq to attorney's fees.

Besides filing for three writs of mandamus. Ergonome employed another unusual tactic by filing a motion for interlocutory appeal to the Fifth Circuit which was denied.

But that is not all. Ergonome filed a 60-page memorandum asking the trial judge to recuse herself on a relatively straightforward and tenuous basis. When the trial court refused to recuse herself, Ergonome followed up with a frivolous 39-page motion to reconsider the denial of the motion to recuse. Ergonome also filed a 63-page request, based on a farfetched theory, that plaintiffs be referred for prosecution. The trial court refused to do so. Ergonome made a demand for $800 million in their complaint. Based on the record in this case, such a demand was preposterous. The trial strategy of the Ergonome defendants was clearly vexatious and oppressive.

The trial court found that there was "an incredible amount of gamesmanship" by Ergonome and Brown and that they had "not acted in good faith." Since lesser sanctions did not get the defendants' attention and did not result in an appropriate response to discovery, and in view of the oppressive and obstructive litigation strategy of the defendants, the sanction imposed by the trial court was appropriate.

APPENDIX B

U.S. COURT OF APPEALS
FILED
NOV 15, 2004
Charles R. Fulbruge III
Clerk

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 01-20861

COMPAQ COMPUTER CORPORATION,
Plaintiff-Counter-Defendant-Appellee,
v.

ERGONOME INCORPORATED,
Defendant-Counter-Claimant-Appellant,

STEPHANIE L. BROWN; THOMAS W. MOWREY,
Defendants-Appellants.

ERGONOME INCORPORATED; ET AL.,
Plaintiffs,
ERGONOME INCOROPORATED, (sic)
Plaintiff-Appellant,
v.

COMPAQ COMPUTER CORPORATION,
Defendant-Appellee.

Appeals from the United States District Court
For the Southern District of Texas, Houston

ON PETITION FOR REHEARING AND REHEARING EN BANC

(Opinion 10/5/04, 5 Cir., ________, ______ F. 3d __________)

Before JONES, DENNIS, and PICKERING, Circuit Judges.

PER CURIAM:

(**X**) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FED. R. APP. P. and 5th CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) The Petition for Rehearing is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor, (FED. R. APP. P. and 5th CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) A member of the court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor Rehearing En Banc is DENIED.

ENTERED FOR THE COURT :

/s/ Edith H. Jones
United States Circuit Judge

Judges Higginbotham, Stewart and Clement did not participate in the consideration of the rehearing en banc.

REHG-4A
CLERK'S NOTE:
SEE FRAP AND LOCAL RULE 41 FOR STAY OF THE MANDATE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
ENTERED
APR 01 2002
Michael N. Milby, Clerk of Court

CIVIL ACTION NO. H-97-1026
AND CONSOLIDATED
CIVIL ACTION NO. H-98-3159

COMPAQ COMPUTER CORPORATION,

PLAINTIFF,

vs.

ERGONOME, INC.,
STEPHANIE L. BROWN, AND
THOMAS MOWREY,

DEFENDANTS.

AMENDED FINAL JUDGMENT

Both actions consolidated in this case, Civil Action 97-1026 and Civil Action No. 98-3159, came on for trial before the Court and a jury, and the issues having been duly tried and the jury having duly rendered its verdict, it is

DECLARED that Defendant Stephanie Brown is the alter ego of the Defendant Ergonome, Inc. for the purposes of this Action; and it is

DECLARED that Plaintiff Compaq Computer Corporation's *Safety & Comfort Guides* **DO NOT INFRINGE** on Defendant Ergonome, Inc., Stephanie L. Brown, and Thomas Mowrey's (collectively referred to as "Ergonome") *The HAND Book*; and Compaq is entitled to the defenses of laches and equitable estoppel; and it is

ORDERED that Defendant Ergonome take nothing, that Ergonome's actions be dismissed on the merits, and Compaq recover from Ergonome Compaq's costs, including, pursuant to Title 17 United Stated Code Section 505 its attorneys fees in the amount of Two Million, seven hundred sixty-five thousand, twenty-six and 90/100 Dollars ($2,765,026.90); and it is

ORDERED that of the Two Million, seven hundred sixty-five thousand, twenty-six and 90/100 Dollars ($2,765,026.90) of Compaq's attorneys fees that, pursuant to Title 28 United States Code Section 1927, Ergonome's former lead counsel, Kent A. Rowald and his law firms, Vaden, Eickenroht & Thompson, LLP and Felsman, Bradley, Vaden, Gunter & Dillon shall be jointly and severally liable with Ergonome and with each other to Compaq for attorneys fees of One hundred one thousand, eight hundred twenty-two and 75/100 Dollars ($101,822.75), the excess fees reasonably incurred by Compaq because of the unreasonable and vexatious conduct of Rowald and his firms.

THIS IS A FINAL JUDGMENT

SIGNED at Houston, Texas, this 30th day of March, 2002.

/s/ Melinda Harmon
MELIDA HARMON
UNITED STATES DISTRICT COURT

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
ENTERED
APR 01 2002
Michael N. Milby, Clerk of Court

CIVIL ACTION NO. H-97-1026
AND CONSOLIDATED
CIVIL ACTION NO. H-98-3159

COMPAQ COMPUTER CORPORATION,

PLAINTIFF,

vs.

ERGONOME, INC.,
STEPHANIE L. BROWN, AND
THOMAS MOWREY,

DEFENDANTS.

FINDINGS OF FACT AND CONCLUSIONS OF LAW REGARDING LACHES AND EQUITABLE ESTOPPEL

In these consolidated actions, the Defendants have asserted that Compaq Computer Corporation ("Compaq") infringed certain limited components of their copyright in the [sic] HAND Book. The jury found that any copying was *de minimis* and that Compaq was entitled to the fair use defense. In addition, Compaq has asserted the defenses of laches and equitable estoppel. Those issues have been tried to the Court by agreement of the parties because they are equitable in nature. Both parties have submitted proposed Findings of Fact and Conclusions of Law on these issues. Compaq has moved to submit additional evidence on the issue of laches and equitable estoppel, and the Court has determined that the motion is well taken and will consider the additional evidence submitted.

After reviewing the record, the evidence submitted on these issues and the applicable law, the Court makes the following Findings of Fact and Conclusions of Law regarding laches and equitable estoppel.

FINDINGS OF FACT

As an alleged willful copyright infringer, Compaq's conduct is subject to scrutiny. The Court has scrutinized Compaq's actions and finds that Compaq has acted equitably throughout this litigation. Its factual and legal positions have been well founded. The jury found that Compaq was entitled to the defenses of *de minimis* and fair use. Moreover, the Court entered judgment as a matter of law on the issue of willful infringement. The Court has evaluated the credibility of Compaq's witnesses and found them to be credible.

On November 11, 1994 Cynthia Purvis, an employee of Compaq, provided to Stephanie L. Brown and her husband Thomas Mowrey a copy of Compaq's 1994 Safety & Comfort Guide. That same day Brown reviewed Compaq's 1994 Safety & Comfort Guide during a sales presentation with Compaq representatives in Houston, Texas. Brown testified that she became "very upset" because she believed that Compaq was infringing her copyright. Tr. Vol. II, p. 85 ll., 9-15. Neither Brown nor Mowrey brought their belief that Compaq was infringing Brown's copyright to Compaq's attention on that day. Tr. Vol. II, P. 85, ll.16-25.

Compaq had, as of November 11, 1994, announced its Safety & Comfort Guide, but had not yet begun to distribute the Guide. The 1994 Guide was not distributed until the very end of December 1994. Tr. Vol. III p. 21, ll. 5117. Both Brown and Mowrey knew that Compaq would be distributing the 1994 Safety & Comfort Guide and that Compaq would continue to distribute it in the future. Tr. Vo. IV, p. 95, ll. 6-14. Despite this knowledge, neither Brown nor Mowrey said anything to Compaq concerning infringement until Mowrey raised the issue in a letter dated December 10, 1996, more than two years after the alleged infringement came to the notice of Brown and Mowrey.

If Compaq had known in November 1994 that Brown and Mowrey would claim infringement, Compaq could have modified its 1994 Guide in an attempt to avoid the allegations of copyright infringement. Dru Kuhner, a Compaq employee, testified that changes could have been made by simply sending different files to be printed. Purvis also testified that changes could have been made within a day or so simply in an attempt "to keep the peace". It was certainly possible to make changes to the 1994 Guide before it was printed in quantity and distributed in late December 1994.

After the November 11, 1994 meeting both Brown and Mowrey had contacts, individually and together, with Compaq. First Brown wrote Purvis at Compaq an "amiable" letter dated December 9, 1994, as a follow-up to the November 11, 1994 meeting. (Plaintiff's Exhibit 169). Brown told Purvis in the letter that Ergonome had a new price for its software KeyMoves that might work for Compaq. Brown said nothing in the letter concerning infringement. As a response to this letter, Brown and Mowrey were invited back to Houston for a meeting Compaq. The meeting was set on January 7, 1995 and was attended by a number of Compaq employees, including Ann Moore, a product manager. Moore stated at that meeting that she did not believe anyone would use the software unless they were injured. (Plaintiff's Exhibit 173). This was acknowledged to be an unfavorable comment by Mowrey. Tr. Vol. IV, p. 67, ll. 10-25, p. 68. ll. 1-2. Despite this unfavorable comment neither Brown nor Mowrey said anything about the potential infringement. Tr. Vol. IV, p. 93, ll. 21-25, p. 94, ll 1-5.

There was no contact between Compaq and Ergonome during February, March, April, May, and June 1995. Tr. Vol. IV, p. 70, ll. 10-24. On or about July 6, 1995 Mowrey telephoned Purvis to re-initiate contact with Compaq. In that conversation Mowrey asked again if there was a possibility for a business arrangement with Compaq. Tr. Vol. IV, p. 74, ll. 18-21, p.72, ll. 4-20. Purvis responded by telling Mowrey that there was a new Compaq division in California that handled software. She told Mowrey that she would inquire whether there was a possibility for Ergonome to meet with the people in that business division. Purvis made inquiries and determined the appropriate person to contact. She telephoned Mowrey on July 20, 1995 and gave him Brad Jung's name. Tr. Vol. IV p. 73, ll. 22-25, p. 74, 1 1. Mowrey then contacted Jung and traveled to California to demonstrate the KeyMoves software to Jung and another Compaq employee, Cary Fulbright. Tr. Vol. IV, p. 75, ll. 10-15 (Plaintiff's Exhibit 214, 220. 221).

In the next few months Mowrey continued to contact Compaq about its interest in the KeyMoves software as an implementation on the Presario line of computers. Mowrey understood that Compaq had a two-step process to determine whether to implement any software onto the Presario line. Tr. Vol. IV, p. 77, ll. 6-19 (Plaintiff's Exhibit 224, 232). Mowrey was never told that either portion of the two-step process had been completed. Tr. Vol. IV, pp. 77, l. 17 through pp. 81, l. 10.

In February 1996, Mowrey learned that Compaq would not be implementing any ergonomic software onto its Presario line of computers for the release that was to come out in June 1996. (Plaintiffs Exhibit 232). Between July 20, 1995 and February 1996 Mowrey never mentioned any potential infringement. The first mention by Ergonome, Brown, or Mowrey to Compaq of their belief that Compaq had infringed the [sic] HAND Book was Mowrey's letter dated December 10, 1996, in which he demanded that Compaq take a license for its alleged infringement. Tr. Vol. IV, pp. 93, ll. 21 through pp. 94, l. 1.

Defendants' silence on the potential infringement is particularly egregious in light of their claimed actual damages of hundreds of millions of dollars. During 1995 and 1996 Mowrey was aware that Compaq's sales were increasing on the order of forty percent per year, which he understood to be a significant incremental increase in sales, yet he and Brown and Ergonome stood mute in the face of their knowledge of the increasing Compaq sales and their belief that Compaq was infringing.

Their excuse is that they were concerned that if they voiced their belief their potential for making a deal with Compaq would be destroyed. Tr. Vol. IV, p. 94, ll. 6-17. The evidence in the case shows, however, that Compaq and Ergonome were never close to a deal. Mowrey testified that making a deal with Compaq was more important that [sic] notifying Compaq of the alleged infringement. Their excuse for failure to notify is not valid. Tr. Vol. IV, p. 94, ll. 6-17.

The delay materially prejudiced and injured Compaq. Had Compaq known of the supposed infringement, it could have modified its 1994 Safety & Comfort Guide to have eliminated any issue of copyright infringement. In 1996 Compaq began developing a revised Safety & Comfort Guide, against which the Defendants initially asserted a copyright infringement claim. This claim was subsequently dropped. The fact that Compaq could develop a non-infringing Guide in 1996 is evidence of its ability to have avoided the alleged infringement in 1994 in order to avoid liability earlier.

In addition Compaq has been prejudiced as a result of the delay in its inability to produce some evidence. Compaq presented evidence of faded memories from witnesses, including Brown herself. Another Compaq witness, Doug James, had a faded memory, as did Emily Perlman, Sylvia Ramos, and Mowrey. Tr. Vol. IV, p. 157, ll 14-24 (Plaintiff's Exhibit 339)

In the circumstances, the silence of Brown and Mowrey concerning their belief that Compaq was infringing constitutes a misleading silence. Compaq certainly relied upon that silence because it had no opportunity to take affirmative action to avoid the alleged infringement. Compaq was materially harmed, both economically and from an evidentiary standpoint.

Conclusions of Law

A. Laches

Compaq bears the ultimate burden of proving laches by a preponderance of the evidence. To invoke a laches defense Compaq must show (1) that Ergonome delayed filing suit for an unreasonable and inexcusable length of time from the point when Ergonome knew or reasonably should have known of its claim against Compaq and (2) Ergonome's delay materially prejudiced or injured Compaq. *Goodman v. Lee*, 78 F. 3d 1007, 1014 (5th Cir. 1996).

Material prejudice to Compaq may be either economic, that is, loss of monetary investments, incurring damages that might otherwise have been avoided by an earlier suit, or evidentiary, that is, preventing the accused party from presenting a full and fair defense to the merits. *A.C. Aukerman Co. v. R.L. Chaides Constr. Co.*, 960 F2d 1020, 1034 (Fed. Cir. 1992) (*en banc*): *Altech Controls Corp. v. E.I.L. Instruments, Inc.*, 33 F. Supp. 2d 546, 553 (S.D. Tex. 1998), *aff'd in part, ref'd in part on other grounds*, WL 487603 (Fed. Cir. May 2 2001). unpublished.

Under both the facts and the law Compaq is entitled to the defense of laches.

B. Equitable Estoppel

Laches focuses upon the reasonableness of delay in bringing suit and the seriousness of the prejudice to the accused infringer. Equitable estoppel "focuses on what the [accused infringer] has been led to reasonably believe from the [claimant's] conduct." *Aukerman*, 960 F2d at 1034. "Where there has been contact or a relationship between the parties during the delay period which may give rise to an inference that the [claimant] has abandoned its claim against [the accused infringer], the fact may lend themselves to analysis under principles of equitable estoppel, as well as laches." *Id.* When equitable estoppel applies, all relief on all claims in a suit may be absolutely barred. *Id.* At 1041. *Cf. Studiengesellschaft Kohle mbH v. Eastman Kodak Co.*, 616 F.2d 1315, 1325 (5th Cir. 1980).

For an equitable estoppel defense the accused infringer must show that (1) the claimant, usually with knowledge of the true facts, through misleading conduct, including silence when there is an obligation to speak, leads the accused infringer to reasonably infer that the claimant does not intend to enforce its rights against the alleged infringer, (2) the alleged infringer relies upon that conduct or communication, and (3) the accused infringer would be materially harmed if the claimant were later permitted to assert a claim inconsistent with his earlier conduct. *Aukerman*, 960 F.2d at 1041; *Studiengesellschaft*, 616 F.3d at 1325; *cf, e.g., Scholle Corp. v. Blackhawk Molding Co., Inc.*, 133 F.3d 1469, 1471, 1473 (Fed. Cir. 1998). "Delay in filing suit may be evidence which influences the assessment of whether [the claimant's] conduct is misleading but is not a requirement of equitable estoppel." *Aukerman*, 960 F.2d at 1042. The defense of equitable estoppel maybe be asserted even when the claim is brought within the statute of limitations period because unreasonable delay prior to filing suit is not an element of equitable estoppel. *Cf. Stewart & Stevenson Svcs. Inc. v. Serv.-Tech Inc.*, 794 F. Supp. 202, 205 (S.D. Tex. 1992), *aff'd* 996 F.2d 318 (Fed. Cir. 1993).

In the instant case Compaq has satisfied all three of the elements. Brown and Mowrey admitted that they believed Compaq had infringed their copyright as early as November 11, 1994, but led Compaq to believe that there was no intent to enforce their rights because they said nothing. Compaq relied upon Brown and Mowrey's silence by continuing to distribute its Guides. Compaq would be materially harmed if Brown, Mowrey, and Ergonome were permitted to assert their claims.

The Court concludes that in light of the circumstances, Compaq is entitled to both the defense of laches and equitable estoppel. Compaq has met its ultimate burden with respect to both of these defenses. The Court further finds that under the facts and equities of this case Compaq should be allowed to assert these defenses and that Compaq is not liable for any damages that might otherwise have arisen with respect to the Defendants' claims of copyright infringement.

To the extent that any finding of fact should properly be designated a conclusion of law and vice versa, that mischaracterization shall not affect the determination of the Court.

SIGNED at Houston, Texas, this 30th day of March, 2002.

/s/ Melinda Harmon
MELINDA HARMON
UNITED STATES DISTRICT JUDGE

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
ENTERED
FEB 11 2002
Michael N. Milby, Clerk of Court

COMPAQ COMPUTER CORPORATION,

Plaintiff,

vs. CIVIL ACTION NO. H-97-1026

ERGONOME INCORPORATED,
STEPHANIE L. BROWN, AND THOMAS
MOWREY,

Defendants.

ERGONOME INCORPORATED and
STEPHANIE L. BROWN,

Plaintiffs,

vs. CIVIL ACTION NO. H-98-3159

COMPAQ COMPUTER CORPORATION,

Defendant.

MEMORANDUM AND ORDER

Pending before the Court is Ergonome Incorporated's Motion to Disregard Findings 5 & 6, Enter Judgment as a Matter of Law, and for a New Trial. (Instrument No. 385). After reviewing the record and the applicable law, the Court concludes that Ergonome's motion should be **DENIED**.

I. FACTUAL AND PROCEDURAL BACKGROUND

The present dispute revolves around five books, three produced by Plaintiff Compaq Computer Corporation ("Compaq") and two produced by Defendants Ergonome Incorporated, Stephanie L. Brown, and Thomas Mowrey (collectively referred to as "Ergonome"). Compaq filed the instant action seeking a declaratory judgment that the three works it produced did not infringe the copyrighted material in Ergonome's two publications.[12]

Compaq's claim was tried before a jury for seven days beginning on July 2, 2001. On the final day of trial, July 11, 2001, the Court instructed the jury on the law and provided the jury with a special interrogatory form with six questions. (Instruments No. 374 and 375). Interrogatories 1 and 3 asked the jury to determine whether Compaq copied from Ergonome's publication, *The HAND Book*. Interrogatories 2 and 4 asked whether Compaq's publications were substantially similar to *The Hand Book*. Interrogatory 5 inquired: "Was Compaq's copying of original portions of *The HAND Book de minimis* as that concept has been explained to you?" Finally, Interrogatory 6 asked whether the original portions copied from *The HAND Book* constituted "fair use." Ultimately, the jury answered "yes" to all six interrogatories.

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[12] For a complete recitation of the pertinent facts see the Court's March 27, 2001 Memorandum Opinion and Order denying Plaintiff's motion for partial summary judgment and Defendant' cross motion for summary judgment. (Instrument No. 293).

B. DISCUSSION

In its present motion, Ergonome asks the Court to disregard the jury's responses to interrogatories [sic] 5 and 6. Ergonome asserts that Interrogatory 5 is legally erroneous because it frames *de minimis* copying as an affirmative defense to infringement. In Interrogatories 1 through 4 the jury determined that Compaq had in fact copied from Ergonome's publication and that the copied work was substantially similar to Ergonome's. Therefore, the jury concluded that Compaq had infringed Ergonome's copyright. Ergonome argues that Interrogatory 5, consequently, is a legal nullity. Once infringement is established, Ergonome asserts, *de minimis* may not be offered as an affirmative defense.

However, Ergonome's assertion that Interrogatory 5 is legally erroneous is untimely. Rule 51 of the Federal Rules of Civil Procedure states that "No party may assign as error the giving or failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection." *See also Hollowell v Orleans Regional Hospital LLC,* 217 F. 3d 379, 389 (5th Cir. 2000). Ergonome not only failed to object to the inclusion of Interrogatory 5, it specifically requested that it be included. The Joint Pretrial Order contains a proposed verdict form submitted by Ergonome. (Instrument No. 319). Question 2 of Egonome's [sic] proposed verdict form asks "Was Compaq's copying of original portions of The HAND Book "de minimis" as that concept has been explained to you?" The Court eventually adopted this proposed question verbatim in the Interrogatory submitted to the jury. Furthermore, Ergonome specifically requested that the interrogatories be arranged in the manner it now asserts was erroneous. Ergonome presently argues that once the jury affirmatively found that Compaq infringed. the *de minimis* issue became moot. However. Question Number 1 of Ergonome's proposed verdict form read[illegible] “Did Compaq's 1994 Safety & Comfort Guide and its 1995 electronic version of that Guide infringe Ergonome's copyright in The HAND Book?” The next question asks the jury to determine whether Compaq's copying was *de minimis*. By previously proposing that which it now argues is erroneous, Ergonome has waived its right to claim error.

Ergonome further asserts that regardless of whether *de minimis* is an affirmative defense, the jury erred by concluding both that Compaq's publications were substantially similar and that the original portions copied by Compaq were *de minimis*. Ergonome asserts that if the works are substantially similar then, by definition, the copying cannot be *de minimis*. However, Ergonome mistakenly assumes that substantial similarity, without more, is sufficient to establish a breach of the copyright laws. Rather, substantial similarities between two works do not establish an infringement if the similarities relate only to unprotected material. In the present case the jury was asked in Interrogatories 2 and 4 to determine whether Compaq and Ergonome's publications are substantially similar. Then, the jury is asked in Interrogatory 5 to determine whether the *original portions* copied from *The HAND Book* were *de minimis*. In answering “yes” to all three interrogatories, the jury concluded that while there were substantial similarities between the works, on the whole, the similarities related to unoriginal material. The copying of *original portions* was so minimal as to require a finding that Compaq did not infringe.

With respect to Interrogatory 6, Ergonome argues that the jury's findings should be disregarded because Compaq failed to introduce any evidence that would tend to support the conclusion that Compaq's copying constituted a fair use of Ergonome's publication. However, on July 10, 2001 Ergonome made the same argument in its motion for judgment as a matter of law on Compaq's fair use defense. (Instrument No. 362). The Court denied that motion. Ergonome does not now raise any new arguments. Accordingly, the Court's previous order stands.

C. CONCLUSION

Ergonome asks the Court to disregard Interrogatory 5 despite the fact that the question was adopted verbatim from Ergonome's proposed verdict form. Undaunted, Ergonome further asserts that the jury concluded the impossible: that Compaq infringed Ergonome's copyright and, at the same time, did not. However, a closer reading of the Interrogatories reveals that the jury concluded that, while there were similarities, there was only a minimal copying of original material. Finally, Ergonome asks the Court to disregard the jury's "fair use" finding. The Court ruled on this very issue when Ergonome first pressed it. The Court stands by its previous ruling.

Accordingly, the Court

ORDERS that Ergonome's Motion to Disregard Findings 5 & 6, Enter Judgment as a Matter of Law, and for a New Trial is **DENIED**.

SIGNED at Houston, Texas, this 8th day of February, 2002.

/s/ Melinda Harmon

MELINDA HARMON

UNITED STATES DISTRICT COURT

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
ENTERED
MAR 27 2001
Michael N. Milby, Clerk of Court

COMPAQ COMPUTER CORPORATION,

Plaintiff,

vs. CIVIL ACTION NO. H-97-1026

ERGONOME, INC.,
STEPHANIE L. BROWN, and
THOMAS MOWREY,

Defendants.

ORDER

Pending before the Court in the above-referenced action are Plaintiff Compaq Computer Corporation's Unopposed Motion for Leave to File Amended Complaint (Inst. No. 183); Plaintiffs Motion to Hold Defendants in Contempt of Court (Inst. No. 190); Defendants Stephanie L. Brown and Thomas Mowrey's Combined Motion for Judgment on the Pleadings (Inst. No. 197); Plaintiffs Motion for Leave to File a Reply to Defendants' Response on Compaq's Motion to Hold Defendants in Contempt of court (Inst. No. 206); and Plaintiffs Motion for Extension of Time to Respond to Defendants' Combined Motion for Judgment on the Pleadings (Inst. No. 208). After reviewing the record and the applicable law, the Court concludes that Plaintiff's Unopposed Motion for Leave to File Amended Complaint is **GRANTED**; Plaintiff's Motion to Hold Defendants in Contempt of Court is **GRANTED**; Defendants Stephanie L. Brown and Thomas Mowrey's Combined Motion for Judgement on the Pleadings is **DENIED**; Plaintiff's Motion for Leave to File a Reply to Defendants' Response on Compaq's Motion to Hold Defendants in Contempt of Court is **DENIED AS MOOT**; and Plaintiff's Motion for Extension of Time to Respond to Defendants' Combined Motion for Judgement on the Pleadings is **DENIED AS MOOT**.

The above pending pleadings all relate to Plaintiff Compaq Computer Corporation's ("Compaq") effort to pursue a claim of alter ego liability with regard to Defendants Stephanie L. Brown ("Brown") and her husband, Thomas Mowrey ("Mowrey"). Reduced to its essence, the current dispute contemplated in the above pleadings is whether such evidence of Brown and Mowrey's alter ego liability exists, and if not, whether Brown and Mowrey are in contempt of court for not facilitating its discovery. The Court holds that Brown and Mowrey are indeed in contempt of court, and that their Motion for Judgment on the Pleadings on the matter is premature and inappropriate in light of their recalcitrance regarding discovery.

A. Compaq's Unopposed Motion for Leave to File Amended Complaint.

The Court first addresses Compaq's Unopposed Motion for Leave to File Amended Complaint. In its motion, Compaq argues that, because Brown and Mowrey have personally availed themselves of this jurisdiction, and because Defendant Ergonome, Inc. ("Ergonome") is their alter ego, their inclusion in the instant case is proper. To Compaq, Brown and Mowrey's inclusion in this case is important because "any award of reasonable costs and attorneys' fees for Compaq ordered against Defendant Ergonome [should] also apply to Brown and Mowrey in their individual capacit[ies] and jointly and severally between themselves and Defendant Ergonome." (Pl.'s Am. Compl. For Decl. J. at 6.)

The Court notes that Compaq's motion for leave is unopposed by Ergonome. Accordingly, the Court grants it.

B. Plaintiff's Motion to Hold Defendants in Contempt of Court.

In its Motion to Hold Defendants in Contempt of Court, Compaq argues that Defendants have failed to abide by the Court's March 15, 2000 Order, which granted Compaq's two motions to compel and mandated that Defendants "provide to Compaq within thirty days ... all discovery covered by" Compaq's motions to compel. (Compaq's motions to compel (Inst.. Nos. 146 and 158) had argued that Defendants had waived all objections to Compaq's discovery requests, especially with regard to those requests about alter ego between Ergonome and Brown.) Compaq presently claims that more than ninety days have passed since the Court's March 15, 2000 Order, and Defendants have still not provided their revised responses to interrogatories as compelled by the Order. As a result, Compaq urges the Court (1) to find that Brown has waived all arguments regarding jurisdiction over her; (2) to notice that no legal distinction exists between Ergonome and Brown; and (3) to impose sanctions on Defendants.

In response, Ergonome rejects Compaq's assumption that the interrogatory answers it provided Compaq were incomplete. Specifically, Ergonome states that, while it preserved attorney-client privilege objections in the interrogatory responses, it nonetheless answered all questions fully. Moreover, Ergonome argues that Court's (sic) March 15, 2000 Order did not pave the way for Compaq to acquire all nonresponsive. privileged documents that Ergonome may have in its possession. Ergonome also offers to provide to the Court all the requested documents at issue for an *in camera* inspection to determine whether such documents are indeed responsive to Compaq's requests. To Ergonome, even if the Court's Order were to require fuller answers by which Compaq can investigate its alter ego theory, a judicial finding that "there is no legal distinction between Ergonome and Brown" is an inappropriate sanction that prematurely gives Compaq the very prize its discovery requests were seeking to investigate.

The Court rejects Ergonome's arguments and holds it in contempt. The Court's March 15, 2000 Order, which levied sanctions against Ergonome for its failure to respond fully to Compaq's interrogatories, clearly contemplated that Ergonome's answers were incomplete in their present state. As a result, the Court ordered Ergonome to respond to Compaq's interrogatories in a manner more complete than it had theretofore. For example, Compaq's Interrogatory No. 1 requested that Ergonome describe "in detail all instances since the date Ergonome was incorporated where the requirements of the New York Business Corporation Law have not been met." Ergonome's response, however, lacked the requested detail: "[T]here was a brief period during which Ergonome was delinquent in payment of its Franchise Taxes. The taxes were later paid .... The exact dates of these transactions are reflected in the corporate records of Ergonome which have been produced previously" Compaq's Interrogatory No. 2 requested that Ergonome and Brown describe "in detail all creditors or service providers of Ergonome, such as banks, utility companies, courier services and all instances where debts or obligations of Ergonome have been paid or satisfied by Brown or a third party." Ergonome's response, much like its response to Interrogatory No. 1, was short and not meaningful: "Ergonome's attorneys have paid certain expenses on behalf of Ergonome as reflected in the Bankruptcy Schedule and other filings, but believes that if any such instances existed, it would be reflected in the check registers of Ergonome and Ms. Brown and in the tax worksheets which have been previously produced."

These were the same cursory answers that the Court condemned in its March 15, 2000 Order. Since that Order, and up to Compaq's motion for contempt, Ergonome has not filed any supplements or otherwise enhanced its responses in any meaningful way. Because, in essence, the situation has not changed since the Court entertained Compaq's motions for sanctions at a hearing on August 5, 1999, the Court holds Defendants in contempt now. While the Court presently declines to hold that no legal distinction exists between Ergonome and Brown as a matter of law, the Court is prepared to do so in light of Defendants' long history of filibuster and delay on the matter. Once again, the Court orders the Defendants to provide all discovery covered by Compaq's motions to compel within thirty days of the Court's present Order. If such adequate discovery is not provided within that time, the Court is prepared to grant the judicial finding Compaq seeks.

C. Brown and Mowrey's Motion for Judgment on the Pleadings.

In their Motion for Judgment on the Pleadings, Defendants Brown and Mowrey essentially attempt to achieve through dispositive pleading what they have not been able to do through discovery resistance. Specifically, Brown and Mowrey argue that, because Ergonome (rather than Brown or Mowrey) owns the copyrights at issue, Compaq's claims against them individually (premised on alter ego principles) should fail as a matter of law.

While Brown and Mowrey cite extensively the doctrine of piercing the corporate veil to support their argument that they are legally distinct from Ergonome, the Court finds that they are ironically invoking the very doctrine on which they have been recalcitrant with regard to Compaq's discovery requests. As noted above, Defendants have failed to respond fully to Compaq's interrogatories regarding the relationship between Ergonome and Brown; such failure directly bears on Compaq's ability to challenge Brown and Mowrey's Motion for Judgment on the merits. *See Grothues v. Internal Revenue Serv.*, 226 F.2d 334, 337 (5th Cir. 2000) (stating that "alter ego theory is just one of several ways to pierce the corporate veil under applicable Texas law") (citing *In re. S.I. Acquisition, Inc.*, 817 F. 2d 1142, 1152 (5th Cir. 1987)). As a result, the Court denies Brown and Mowrey's motion, leaving the option for them to re-urge their motion after they have complied fully with Compaq's discovery requests.

D. Compaq's Motion for Leave to File a Reply & Compaq's Motion for Extension of Time to Respond

Finally, in light of the forgoing (sic), the Court denies as moot Compaq's Motion for Leave to File a Reply to Defendants' Response on Compaq's Motion to Hold Defendants in Contempt of Court. Similarly, the Court denies as moot Compaq's Motion for Extension of Time to Respond to Brown and Mowrey's Combined Motion for Judgment on the Pleadings. If, after adequately providing Compaq's requested discovery, Brown and Mowrey re-urge their Motion for Judgment on the Pleadings, Compaq may respond to that motion in turn.

Accordingly, the Court

ORDERS that Plaintiffs Unopposed Motion for Leave to File Amended Complaint is **GRANTED;**

ORDERS that Plaintiffs Motion to Hold Defendants in Contempt of Court is **GRANTED;**

ORDERS that Defendants Stephanie L. Brown and Thomas Mowrey's Combined Motion for Judgment on the Pleadings is **DENIED**;

ORDERS that Plaintiffs Motion for Leave to File a Reply to Defendants' Response on Compaq's Motion to Hold Defendants in Contempt of Court is **DENIED AS MOOT**;

ORDERS that Plaintiffs Motion for Extension of Time to Respond to Defendants' Combined Motion for Judgment on the Pleadings is **DENIED AS MOOT;** and further

ORDERS that Defendants shall provide Compaq within thirty (30) days of entry of this Order all discovery contemplated in Compaq's Motion to Compel (Ins. No. 146), Compaq's Reasserted Motion to Compel (Inst. No. 158), and the Court's March 15, 2000 Order.

SIGNED at Houston, Texas, this 26th day of March, 2001.

/s/ Melinda Harmon
MELIDA HARMON
UNITED STATES DISTRICT JUDGE

APPENDIX G

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
ENTERED
JUN 28 2001
Michael N. Milby, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

COMPAQ COMPUTER CORPORATION,

Plaintiff,

vs. CIVIL ACTION NO. H-97-1026

ERGONOME, INC.,
STEPHANIE L. BROWN, and
THOMAS MOWREY,

Defendants.

ORDER

Pending before the Court are Defendant Ergonome, Incorporated's ("Ergonome") Motion in Limine to Exclude Evidence of Dealings with Other Computer Companies and Price Negotiations Regarding Other Products by Ergonome, Incorporated (Inst. No. 234); Plaintiff Compaq Computer Corporation's ("Compaq") Motion in Limine (Inst. No. 283); and Plaintiff's Motion in Limine to Exclude Any Questions or Argument About the Timing of the Production of Document No. CPQ 00221931-38 (Inst. No. 284). To the extent the Court grants a motion in limine below, the parties' counsel must approach the Bench at trial before introducing any evidence or eliciting any testimony regarding a matter covered in the applicable motion in limine.

A. Ergonome's Motion in Limine to Exclude Evidence of Dealings with Other Computer Companies and Price Negotiations Regarding Other Products by Ergonome, Incorporated (Inst. No. 234).

By motion dated June 28, 2001, Compaq has indicated that the Court's recent summary judgment on Ergonome's fraud claim has mooted Compaq's opposition to Ergonome's motion in limine. As a result, the Court **ORDERS** that Ergonome's motion is **MOOT**.

B. Compaq's Motion in Limine (Inst. No. 283).

On the items in Compaq's motion in limine, the Court **ORDERS**

1. That the motion in limine regarding any reference to repetitive stress injury is **GRANTED**;
2. The motion in limine regarding any reference to Cynthia Purvis's meeting with Compaq's in-house counsel in November 1994 is **GRANTED**;
3. That the motion in limine regarding any mention of a so-called kicker provision between Compaq and Terry Gruber is **GRANTED**;
4. That the motion in limine regarding any reference to the Al Deaver opinion is **GRANTED**;
5. That the motion in limine regarding any reference to the CAD sketch mode version is **GRANTED**;
6. That the motion in limine regarding the attempt by opposing counsel to call as a witness Mark Collmer is **GRANTED**;

7-12. That the motion in limine regarding items number 7 through 12 on Compaq's motion in limine is **GRANTED**;

13. That the motion in limine regarding any use by the Defendants of the deposition testimony of witnesses that are within the subpoena power of the Court is **DENIED**;

14. That the motion in limine regarding any testimony of Don McFall regarding his representation of Compaq in the Patsy Heard litigation is **GRANTED**;

15. That the motion in limine regarding the financial condition of Compaq is **GRANTED**; and

16. That the motion in limine regarding any reference to the fact that Compaq is using a jury consultant is **GRANTED**.

C. Compaq's Motion in Limine to Exclude Any Questions or Argument About the Timing of the Production of Document No. CPQ 00221931-38 (Inst. No. 284).

With respect to Compaq's motion in limine to exclude any testimony or argument about the timing of the production of document number CPQ 00221931-38, the Court

ORDERS that the motion is **GRANTED**.

SIGNED at Houston, Texas, this 28th day of June, 2001.

/s/ Melinda Harmon
MELINDA HARMON
UNITED STATES DISTRICT JUDGE

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
ENTERED
APR 01 2002
Michael N. Milby, Clerk of Court

CIVIL ACTION NO. H-97-1026
AND CONSOLIDATED
CIVIL ACTION NO. H-98-3159

COMPAQ COMPUTER CORPORATION,

PLAINTIFF,

vs.

ERGONOME, INC.,
STEPHANIE L. BROWN, AND
THOMAS MOWREY,

DEFENDANTS.

ORDER

Pending before the Court are three post-judgment motions:

1. Motion of Defendants Brown and Mowrey to Alter or Amend Final Judgment (Instrument No. 384)

2. Motion and Memorandum of Compaq Computer Corporation (Compaq) in Support of Its Claim for Attorneys' Fees Pursuant to Rule 54 Fed. R. Civ. P., 17 U.S.C Sec. 505 and 28 U.C. Sec. 1927 (Instrument No. 386)

2. Motion and Memorandum by Compaq to Amend or Clarify the Final Judgment (Instrument No. 388).

Brown and Mowrey's Motion to Alter or Amend Final Judgment

In their motion the defendants Brown and Mowrey seek to have themselves individually removed from the Judgment that was entered in this case on July 16, 2001. Their reasoning is that they were never sued by Compaq and the corporate veil of Ergonome, Inc., the corporation of which they are the principals, was never pierced by Compaq. They fear that they will otherwise be subject to a judgment for costs and attorneys' fees.

Their motion is a re-urging of the same points in their Motion for Judgment on the Pleadings, which was denied March 26, 2001. Brown and Mowrey were ordered to provide Compaq with necessary discovery to attempt to pierce the corporate veil of Ergonome, Inc., but Brown and Mowrey continued for over two years to refuse to provide the discovery. The Court's order of March 26, 2001 gave them an opportunity to provide the discovery and reurge the motion for judgment, but Brown and Mowrey chose not to provide the discovery. They also failed to renew the motion for judgment. Nor did they raise the alter ego question as an issue in the Pretrial Order. Thus that issue was waived. *Kona Technology Corp. v. Southern Pacific Transport Company*, 225 F.3d 595, 604 (5th Cir. 2000). Finally, Compaq moves that as a sanction for failure to provide discovery she ordered to provide, Brown be declared the alter ego of Ergonome, Inc. For over two years Brown refused to provide the detailed discovery requested by Compaq in their quest for evidence to pierce Ergonome's corporate veil. Although she was on notice of the detail and had been held in contempt for failure to provide the interrogatory answers, she failed to comply with the discovery. As a sanction the Court will declare Brown to be the alter ego of Ergonome, Inc., and will deny the motion to alter or amend the final judgment. Throughout the remainder of the opinion the term "Ergonome" will be used to refer to Ergonome, Inc., Stephanie L. Brown and Thomas Mowrey.

Compaq Computer Corporation's Motion for Attorneys' Fees

Compaq Computer Corporation moves for its attorneys' fees incurred in the prosecution of this case, pursuant to Rule 54 of the Federal Rules of Civil Procedure, 17 U.S.C Sec. 505, and 28 U.S.C. Sec. 1927.

The Copyright Act, 17 U.S.C. Sec. 505 provides

> In any civil action under this title, the court in its discretion may allow the recovery of full costs by or against any party other than the United States or an officer thereof. Except as otherwise provided by this title, the court may also award a reasonable attorney's fee to the prevailing party as part of the costs.

In *Fogarty* (sic) *v. Fantasy Inc.*, 510 U.S. 517 (1994) the Supreme Court held that prevailing accused infringers are to be treated the same as prevailing copyright owners in the consideration of an award of attorney's fees under the Copyright Act, 17 U.S.C. Sec. 505. The Fifth Circuit has acknowledged that an award of attorney's fees in copyright cases is within the discretion of the trial court, but has held that the award of attorney's fees in copyright cases is the "rule rather than the exception, and should be awarded routinely." Hogan Systems, Inc v. Cybresource Int'l. Inc., 158 F.3d 319, 325 (5th Cir. 1998); McGaughey v. Twentieth Century Fox Film Corporation, 12 F.3d 62, 65 (5th Cir. 1994).

The Court considered these factors in its determination that Compaq should be awarded its reasonable attorneys' fees:

(1) The amount alleged as actual damages by Ergonome was over $800 million;

(2) Ergonome included causes of action for fraud, misappropriation, unjust enrichment, quantum meruit, and unfair competition in addition to the copyright claims of infringement of the 1994, 1995, and 1997 Guides. All of these additional claims flowed out of and were based on the alleged copyright infringement;

(3) Ergonome, from the beginning of the litigation, failed to respond timely to discovery, which resulted in monetary sanctions and holdings of contempt;

(4) Ergonome filed a multitude of non meritorious motions.

(5) Ergonome rejected an offer of judgment for $200,000 almost two years before trial;

(6) The testimony of Mowrey and Brown was, in several instances, not credible;

(7) Ergonome's counsel had the case on a 40% contingency basis, which, had the case been successful, would have resulted in fees in excess of 120 times the fees Compaq claims here.

Compaq has provided the Court with evidence in the form of billing records and declarations submitted with Compaq's motion of its attorneys' fees in the amount of $2,765,026.90. The Court has reviewed these billing records and declarations, and concludes that, in view of the circumstances of this case, the amount of time and the billing rates of the lawyers, law clerks, and paralegals, were both necessary and reasonable.

Compaq also seeks attorneys fees pursuant to 28 U.S.C. Sec. 1927 from Ergonome's former counsel, the law firms of (1) Gold, Farrell & Marks and (2) Vaden, Eickenroht & Thompson, LLP; Felsman, Bradley, Vaden Gunter and Dillon; and the individual lawyers from those firms who made appearances in the case, including former lead counsel, Kent A. Rowald ("Rowald's firms").

Title 28 United States Code, Section 1927 provides:

> Any attorney. . .who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the Court to satisfy personally the excess costs, expenses, and attorney's fees reasonably incurred because of the conduct.

Compaq is seeking attorneys fees from the two firms that preceded as counsel of record the attorneys who substituted in at the end of November 2000 and who took the case to trial. Gold, Farrell & Marks represented Ergonome for approximately 4 months. The firm sent a letter to Compaq on March 13, 1997 demanding $79,000,000 for Compaq's alleged copyright infringement. Compaq filed suit for declaratory judgment on March 28, 1997. Gold, Farrell & Marks vigorously defended Compaq's declaratory judgment action and filed Ergonome's own suit for copyright infringement in New York. On August 7, 1997 Gold, Farrell & Marks was replaced by Kent A. Rowald and his firms. Although the case began with vigorous prosecution by Gold, Farrell & Marks, and there were questionable failures to provide prompt discovery, the Court cannot say that Ergonome's original attorneys "unreasonably and vexatiously" multiplied the proceedings. The Court will not assess attorneys' fees against that firm.

The same cannot be said for Kent A. Rowald and his firms, however. Rowald engaged in (1) continuous failure to provide discovery, which resulted in a sanctions order of $34,000 and the eventual holding of his clients in contempt; (2) seeking this Court's recusal on patently frivolous grounds; (3) seeking three mandamus actions against this Court, each of which were denied by the Fifth Circuit Court of Appeals; and (4) moving for a referral of Compaq, certain of its personnel, and its attorneys in the case to the United States Attorney for investigation and possible prosecution pursuant to the Hobbs Act. For each of these course of conduct (sic), Compaq had to prepare motions, briefs, and responses. Compaq seeks all of the fees it generated from August 7, 1997, when Rowald's firms substituted in until November 2000 when they were replaced, based upon language in *Browning v. Kramer*, 931 F. 2d 340, 345 (5th Cir. 1991) that suggests if the case has from the beginning been lacking in merit all the fees and costs can be recovered. That case goes on to hold, however, that the party seeking all the costs and fees must show "with 'convincing clarity' that *every* facet of this litigation was patently meritless" in order to recover all the fees. *Id., quoting National Ass'n of Gov't Employees v. National Fed'n of Fed. Employees*, 844F.2d216,223 (5th Cir. 1988) [emphasis in the original]. "Except when the entire course of proceedings were unwarranted and should neither have ben [sic] commenced nor persisted in, an award under Sec. 1927 may not shift the entire financial burden of an action's defense." *Browning v. Kramer*, 931 F.2d at 345. Although ultimately found to be without merit, the instant case does not fit the description of "entirely unwarranted," and is not the kind of case in which all fees and expenses could be recovered under Sec. 1927. The Court believed it necessary to comb through the billing records of

Compaq's attorneys to determine what excess fees and costs were reasonably incurred because of the Rowald firms' unreasonable and vexatious conduct. Compaq's fees were generated on and off from April 1998 through most of July 1999. The excess fees reasonable incurred because of the unreasonable and vexatious conduct totaled, by the Court's calculation, $101.822.75. The Court could not determine from the billing records what expenses of the Compaq attorneys could be attributed to responses to the Rowald firms' unreasonable and vexatious conduct, and expenses are not included in the figure.

The Court will deny Compaq's motion pursuant to 28 U.S.C. Sec. 1927 as to Gold, Farrell & Marks and grant the motion, in part as to Vaden, Eickenroht & Thompson, LLP; Felsman, Bradley, Vaden, Gunter & Dillon; and the individual lawyers from those firms who made appearances in the case, including former lead counsel, Kent A. Rowald.

Compaq's Motion to Amend or Clarify the Final Judgment

Finally, Compaq moves the Court to Amend or Clarify the Final Judgment (1) to include the Court's decision on Compaq's issues of laches and equitable estoppel that were tried to the Court whilst the other issues were tried to the jury; (2) to clarify that costs should include Compaq's attorneys fees; and (3) to hold that, as a sanction for her conduct, defendant Stephanie Brown be held to be the alter ego of Ergonome. Both parties have submitted proposed findings of fact and conclusions of law on the laches and equitable estoppel issues. The Court has ruled *supra* on the second and third matters, and its Findings of Fact and Conclusions of Law will constitute the ruling on the first matter raised in the motion to amend or clarify the final judgment. Accordingly, it is hereby

ORDERED that the Motion of Defendants Brown and Mowrey to Alter or Amend Final Judgment (Instrument No. 384) is DENIED. It is further

ORDERED that the Motion of Compaq Computer Corporation for Attorneys' Fees (Instrument No. 386) is GRANTED in part and DENIED in part. Ergonome shall be liable to Compaq for attorneys' fees pursuant to 17 U.S.C Sec. 505 in the reasonable and necessary amount of $2,765,026.90. The law firm of Gold, Farrell & Marks shall not be liable to Compaq for attorneys fees pursuant to 28 U.S.C. Sec. 1927. Pursuant to 28 U.S.C. Sec. 1927, Ergonome's former lead counsel, Kent A. Rowald and his law firms, Vaden, Eickenroht & Thompson, LLP and Felsman, Bradley, Vaden, Gunter & Dillon shall be jointly and severally liable with Ergonome and with each other to Compaq for attorneys fees of $101,822.75, the excess fees reasonably incurred by Compaq because of the unreasonable and vexatious conduct of Rowald and his firms. It is further

ORDERED that the Motion by Compaq to Amend or Clarify the Final Judgment (Instrument No. 388) is GRANTED.

Signed at Houston, Texas, this 30th day of March, 2002.

/s/ Melinda Harmon
MELINDA HARMON
UNITED STATES DISTRICT JUDGE

APPENDIX I

CONSTITUTIONAL and STATUTORY PROVISIONS INVOLVED (pursuant to Rule 14.1.(f)

1. **U.S. Constitution, Article I, § 8, Clause 8**, confers upon Congress the Power:

> To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.

2. **The Copyright Act, Title 17 United States Code**, provides in pertinent part:

§ 106. Exclusive rights in copyrighted works

Subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

(1) to reproduce the copyrighted work in copies or phonorecords;

(2) to prepare derivative works based upon the copyrighted work;

(3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;

(4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;

(5) in the case of literary, musical, dramatic, and

choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and

(6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

§ 107. Limitations on exclusive rights: Fair use

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

(2) the nature of the copyrighted work;

(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

(4) the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

§ 504. Remedies for infringement: Damages and profits

(a) In General.— Except as otherwise provided by this title, an infringer of copyright is liable for either—

(1) the copyright owner's actual damages and any additional profits of the infringer, as provided by subsection (b); or

(2) statutory damages, as provided by subsection (c).

(b) Actual Damages and Profits.— The copyright owner is entitled to recover the actual damages suffered by him or her as a result of the infringement, and any profits of the infringer that are attributable to the infringement and are not taken into account in computing the actual damages. In establishing the infringer's profits, the copyright owner is required to present proof only of the infringer's gross revenue, and the infringer is required to prove his or her deductible expenses and the elements of profit attributable to factors other than the copyrighted work.

...

§ 505. Remedies for infringement: Costs and attorney's fees

In any civil action under this title, the court in its discretion may allow the recovery of full costs by or against any party other than the United States or an officer thereof. Except as otherwise provided by this title, the court may also award a reasonable attorney's fee to the prevailing party as part of the costs.

3. Federal Rules of Evidence, Rule 403, provides:

Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

3. Federal Rules of Civil Procedure, Rule 33, provides in pertinent part:

Rule 33. Interrogatories to Parties

(d) Option to Produce Business Records.

> Where the answer to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business records, including a compilation, abstract or summary thereof, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries. A specification shall be in sufficient detail to permit the interrogating party to locate and to identify, as readily as can the party served, the records from which the answer may be ascertained.

APPENDIX J

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
FILED
07/11/01
MICHAEL N. MILBY, CLERK
BY DEPUTY /s/ H. Tippen

COMPAQ COMPUTER CORPORATION,

Plaintiff,

vs. CIVIL ACTION NO. H-97-1026

ERGONOME INCORPORATED,
STEPHANIE L. BROWN, and THOMAS
MOWREY,

Defendants.

COURT'S INSTRUCTIONS TO THE JURY

GENERAL INSTRUCTIONS

Members of the Jury:

In any jury trial, there are, in effect, two judges. I am one of the judges, the other is the jury. It is my duty to preside over the trial and decide what evidence is proper your consideration. It is also my duty at the end of the trial to explain to you the rules of law that you must follow and apply in arriving at your verdict.

First, I will give you some general instructions which apply in every case, for example, instructions about the burden of proof and how to judge the believability of witnesses. Then I will give you some specific rules of law about this particular case, and finally I will explain to you the procedures you should follow in your deliberations.

You, as jurors, are judges of the facts. But in determining what actually happened, that is, in reaching your decision as to the facts, it is your sworn duty to follow all of the rules of law as I explain them to you.

You have no right to disregard or give special attention to any one instruction or to question the wisdom or correctness of any rule I may state to you. You must not substitute or follow your own motion or opinion as to what the law is or ought to be. It is your duty to apply the law as I explain it to you, regardless of the consequences.

It is also your duty to base your verdict solely upon the evidence, without prejudice or sympathy. That was the promises you made and the oath you took before being accepted by the parties as jurors and they have the right to expect nothing less.

You will hear the closing arguments of the attorneys. Statements and arguments of the attorneys are not evidence and are not instructions on the law. They are intended only to assist the jury in understanding the evidence and the parties' contentions.

Your verdict form consists of six questions called Special Interrogatories. You must answer all questions in your verdict form from a preponderance of the evidence. By this is meant the greater weight and degree of credible evidence before you. In other words, a preponderance of the evidence just means the amount of evidence that persuades you that a claim is more likely so than not so. In determining whether any fact has been proved by a preponderance of the evidence in the case, you may, unless otherwise instructed, consider the testimony of all witnesses, regardless of who called them, and all exhibits received in evidence, regardless of who may have produced them.

Answer each question from the facts as you find them. Do not decide who you think should win and then answer the questions accordingly. If the party with the burden of proof on any particular special interrogatory fails to convince you by a preponderance of the evidence, then you must find for the other party. Your answers and your verdict must be unanimous.

As stated earlier, it is your duty to determine the facts, and in so doing, you must consider only the evidence I have admitted in the case. The term "evidence" includes the sworn testimony of the witnesses and the exhibits admitted as evidence in the record. From time to time, I have ruled on the admissibility of evidence. You must not concern yourself with the reasons for my rulings. Any evidence to which I sustained an objection and any evidence ordered stricken must be entirely disregarded.

Remember that any statements, objections or arguments made by the lawyers are not evidence in the case. The function of the lawyers is to point out those things that are more significant or more helpful to their side of the case, and in so doing, to call your attention to certain facts or inferences that might otherwise escape your notice. In the final analysis, however, it is your own recollection and interpretation of the evidence that control in the case. What the lawyers say is not binding upon you.

An admission by a party is to be taken by you as a proven fact.

You will recall that during the course of this trial, I instructed you that certain testimony and certain exhibits were admitted into evidence for a limited purpose, and I instructed you that you may consider such evidence only for the limited purposes for which they were admitted.

While you should consider only the evidence in the case, you are permitted to draw such reasonable inferences from the testimony and exhibits as you feel are justified in the light of common experience. In other words, you may make deductions and reach conclusions which reason and common sense lead you to draw from the facts which have been established by the testimony and evidence in the case.

There are two types of evidence that you may consider in properly finding the truth as to the facts in the case. One is direct evidence, such as testimony of an eye witness. The other is indirect or circumstantial evidence, the prove of a chain of circumstances that indicates the existence or nonexistence of certain other facts. The law makes no distinct between direct and circumstantial evidence but simply requires that you find the facts by direct and circumstantial evidence from the relevant standard of proof, by a preponderance of the evidence.

Certain charts and summaries have been received into evidence to illustrate facts brought out in the testimony of some witnesses. Charts and summaries are only as good as the underlying evidence that supports them. You should, therefore, give them only such weight as you think the underlying evidence deserves, whether in the form of testimony or witnesses or contemporaneous written documents.

Now, I have said that you must consider all of the evidence. This does not mean, however, that you must accept all of the evidence as true or accurate. You are the sole judges of the credibility or "believability" of each witness and the weight to be given to his or her testimony. In weighing the testimony of a witness, you should consider the witness's relationship to the plaintiff or to the defendant; the witness's interest, if any, in the outcome of the case; the witness's manner of testifying; the witness's opportunity to observe or acquire knowledge concerning the facts about which he or she testified; the witness's candor, fairness and intelligence; and the extent to which he or she has been supported or contradicted by other credible evidence. You may, in short, accept or reject the testimony of any witness in whole or in part.

A witness may be discredited or "impeached" by contradictory evidence, by a showing that he or she testified falsely concerning a material matter, or by evidence that at some other time the witness has said or done something, or has failed to say or do something, which is inconsistent with the witness's present testimony.

When a witness is questioned about an earlier statement the witness may have made or earlier testimony that may have been given, such questioning is permitted in order to aid you in evaluating the truth or accuracy of the testimony at the trial. Earlier statements made by a witness may be evidence of the truth or accuracy of such statements, and are also referred to for the purpose of giving you a comparison and aiding you in your determination concerning the credibility or weight to be given to the witness's testimony which you heard at trial.

If you believe that any witness has been so impeached, then it is your exclusive province to give the testimony of that witness such credibility or weight, if any, as you may think it deserves. You should keep in mind, of course, that a simple mistake by a witness does not necessarily mean that the witness was not telling the truth as he or she remembers it, because people may forget some things or remember other things inaccurately. So, if a witness has made a misstatement, you need to consider whether that misstatement was an intentional falsehood or simply an innocent lapse of memory; and the significance of that may depend on whether it has to do with an important fact or with only an unimportant detail. The weight of the evidence is not necessarily determined by the number of witnesses testifying as to the existence or non-existence of any fact. You may find that the testimony of a smaller number of witnesses as to any fact has more credibility than the testimony of a larger number of witnesses to the contrary. The testimony of a single witness may be sufficient to prove any fact, even if a greater number of witnesses may have testified to the contrary, if after considering all the other evidence, you believe that single witness.

You have heard the testimony of Payne Harrison and Steven Moore as expert witnesses. The rules of evidence provide that if scientific, technical or other specialized knowledge might assist the jury in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify and state his or her opinion concerning such matters. You should consider each expert opinion received in evidence in this case and give it such weight as you may think it deserves. If you should decide that the opinion of an expert witness is not based upon sufficient education and experience or if you should conclude that the reasons given in support of the opinion are not sound or that the opinion is outweighed by other evidence, then you may disregard the opinion entirely.

In deciding whether to accept or rely upon the opinion of an expert witness, you may consider any bias of the witness, including any bias you may infer from evidence that the expert witness has been or will be paid for reviewing the case and testifying, or from evidence that he testifies regularly as an expert and his income from such testimony represents a significant portion of this income.

Similarly, in certain limited circumstances, the Court will permit lay witness to give an opinion to the observation of an everyday occurrence; that is, those matters within the common experience of most persons. In such cases, the witness's testimony in the form of opinions or inferences is limited to those opinions which are, (a), rationally based on the perception of the witness, and (b), helpful to a clear understanding of the witness's testimony or the determination of a fact in the case. The "perception of the witness" means that the witness has firsthand, personal knowledge of the subject.

Certain testimony has been presented to you through deposition. A deposition is the sworn, recorded answers to questions asked a witness in advance of trial. Under some circumstances, if a witness cannot be present to testify from the witness stand, that witness's testimony may be presented under oath in the form of a deposition. Some time before this trial, attorneys representing the parties in the case questioned this witness under oath. A court reporter was present and recorded the testimony. The questions and answers have either been read to you, or in some instances, played on videotape. This deposition testimony is entitled to the same consideration and is to be judged by you as to credibility as if the witness had been present and had testified from the witness stand in court.

Do not let bias, prejudice or simply play any part in your deliberations.

A corporation and all other persons are equal before the law and must be treated as equals in a court of justice. Both- parties, Ergonome Incorporated and Compaq Computer Corporation are corporations. When a corporation is involved, of course, it may act only through natural persons as its agents or employees, and any agent or employee of a corporation may bind the corporation by his or her acts or declarations made while acting within the scope of his or her authority delegated to him or her by the corporation or within the scope of his or her duties as an employee of the corporation.

Any notes that you have taken during this trial are only an aid to your memory. If your memory differs from your notes, you should rely on your memory and not on the notes. The notes are not evidence. If you have not taken notes, you should rely on your independent recollection of the evidence and should not be unduly influenced by the notes of other jurors. Notes are not entitled to any greater weight than the recollection or impression of each juror about the testimony.

SPECIFIC INSTRUCTIONS

The principal issue in this case is copyright infringement. You are instructed that *The HAND Book* is a copyrighted work subject to the protection of the Copyright Act. Ergonome claims that Compaq unlawfully copied or infringed Ergonome's copyright in *The HAND Book.*

Compaq claims that there is no infringement because the allegedly infringing portions of Compaq's *Safety & Comfort Guides* are not substantially similar to the corresponding portions of *The HAND Book*, that any similarities between Compaq's *Safety & Comfort Guides* and *The HAND Book* are minimal, and that the depictions at issue in Compaq's *Safety & Comfort Guide* were independently created.

Copyright is the name for the protection that the law extends to an author of original work against the unauthorized appropriation of that work by others.

The law accepts that there are at least two competing considerations involved. On the other hand, the creator of work has the right to reap the benefit of her creativity and effort. On the other hand, progress in art as well as science requires that everyone have the right to develop and create new works using the same ideas and subjects.

The copyright law attempts to strike a balance between these two values, protecting so much of the author's original work as embodies her own particular form of expression, but not so much as would prevent others from using the same ideas, themes and subjects in their own forms of expression.

In this case, Ergonome bears the burden of proving by a preponderance of the evidence that its copyright in *The HAND Book* was infringed by Compaq. To prove copyright infringement, Ergonome must prove by a preponderance of the evidence that Compaq actually copied *The HAND Book* and that the resulting work is substantially similar to the work copied.

Actual copying can be proved by direct evidence. An example of direct evidence would be an admission by an employee of Compaq that the work was copied or the testimony of someone who saw the work being copied. If you find direct evidence of actual copying sufficient to persuade you, by a preponderance of the evidence, that actual copying took place, then that ends the inquiry as to actual copying.

Ergonome may establish that Compaq actually copied by circumstantial evidence by proving two elements:

First: that the employees at Compaq who created the elements at issue had access to *The HAND Book.*

Second: that the *Safety & Comfort Guide* is probatively similar to *The HAND Book.*

Access means prove sufficient to show that the person who created the individual components of the *Safety & Comfort Guides* had a reasonable opportunity to view *The HAND Book.*

Compaq may rebut a showing of actual copying by offering evidence that its work was independently created without reference to the prior work. If you find by a preponderance of the evidence that Compaq's work was an independent creation, then you must find there was no infringement.

Probatively similar means that when the portions at issue of the *Safety & Comfort Guides* and the portions at issue of *The HAND Book* are compared, they are so similar that the similarity is enough to establish that Compaq copied the pictures and phrases at issue from Ergonome.

If you find similarities between the works, you must ask yourself whether the similarities are or are not of the kind which would be likely to occur without copying. Similarity can result from copying but there are other possible explanations for similarity. On the other hand, certain similarities may be very convincing proof of copying. The more original, the more unusual or imaginative or arbitrary the material that you find to be similar in both works is, the less likely that similarity is a coincidence. The more extensive the similarity and the more it extends to small, arbitrary details, the more likely as a matter of common sense, that it is due to copying rather than to coincidence, or the suggestiveness of the subject matter. You may consider any relevant circumstances from which you may draw an inference that actual copying has taken place or that actual copying has not taken place.

Not all copying is copyright infringement. If you have found actual copying, then you must determine whether the two works are substantially similar. To determine whether the two works are substantially similar, you must make a side-by-side comparison between *The HAND Book* and Compaq's *Safety & Comfort Guide* in their entirety and also a comparison of the protected portions of the work at issue to determine whether you, as a jury, without any aid or suggestion or critical analysis by others, view the two works as substantially similar. Your reaction should be spontaneous and immediate. In considering the similarity of the works, you must also consider whether the protection of the copyright is thin, that is, whether the nature of the creation makes similarity necessary. When similar features are as a practical matter indispensable, or at least standard, in the treatment of a given idea, the indispensable protection may be protected only against virtually identical copying.

Compaq has raised two defenses upon which it bears the burden of proof, *de minimis* and "fair use".

De minimis

If you should determine that *The HAND Book* and *Safety & Comfort Guide* are substantially similar, you must then determine whether the amount of copying is *de minimis*. By *de minimis*, I mean that the amount taken is so meager and fragmentary that the average audience would not recognize the appropriation. The legal concept of *de minimis* does not mean that copying copyrighted material is proper, so long as the copying, though significant, is done in moderation. Rather, in considering this contention, you should focus on both the quantitative and qualitative aspects of any copying. The qualitative component concerns the copying of expression, rather than ideas, and focuses on the importance of the copyrighted material at issue, taking into consideration prior similar expressions. The quantitative component concerns the amount of the copyrighted work that is copied. In cases involving visual works, this includes such factors as focus, lighting, camera angles and prominence. You are instructed that Compaq has the burden of proving by a preponderance of the evidence that the amount taken was *de minimis*.

"**Fair Use**"

If you have found actual copying and substantial similarity, you must determine if such copying was what the copyright law calls "fair use". Fair use of a copyrighted work is not infringement of a copyright. Fair use of a copyrighted work includes uses of a copyrighted work for purposes such as criticism, comment, news reporting, teaching, scholarship or research.

In this case, Compaq asserts that any use it may have made of *The HAND Book* in its *Safety & Comfort Guide* amounted to fair use. In determining whether the use that was made of a work in any particular case is fair use, you may consider:

First: the purpose and character of the use, including whether the use is commercial in nature or is for nonprofit, educational purposes;

Second: the nature of the copyrighted work;

Third: the amount and substantiality of the portion used in relation to the copyrighted work as a whole;

Fourth: the effect of using the misappropriated portions of the copyrighted work upon the potential market for or value of the copyrighted work.

You may consider other factors in addition to the four factors I have just given you. If you decide that Compaq's use amounted to fair use, then you must find Compaq not liable for copyright infringement. You are instructed that Compaq bears the burden of proof by a preponderance of the evidence that its use constituted fair use.

THE VERDICT

In order to return a verdict, your verdict must be unanimous. It is your duty as jurors to consult one another and to deliberate with a view towards reaching an agreement. Each of you must decide the case for yourself but only after an impartial consideration with each other of all the evidence in the case.

In the course of your deliberations, do not hesitate to re-examine your own view and change your opinion if convinced it is erroneous. Do not, however, surrender your honest conviction as to the weight or effect of the evidence solely because of the opinion of other jurors or for the mere purpose of returning a verdict. Remember at all times that you are not partisans. You are judges, judges of the facts. Your sole interest is to seek the truth from the evidence in the case.

When you go to the jury room, the first thing you should do is select one of your number as your foreman, who will help to guide your deliberations and will speak for you here in the courtroom. A verdict form has been prepared for your convenience.

During your deliberations, you must never disclose to anyone, not even to me, your numerical division on any question.

After you have reached your unanimous verdict, the foreman shall fill in your answers to the questions on the Special Interrogatory Verdict Form, shall date and sign the last page of that form, and shall notify the marshal that you have reached a verdict. The marshal will then deliver the verdict to me. Do not reveal your verdict to anyone until you are brought back into open court for the purpose of delivering your verdict.

If you want to communicate with me at any time, your foreman will reduce your message or question to writing, sign it, and pass the note to the marshal, who will bring it to my attention. I will then respond as promptly as possible either in writing or by having you brought into the courtroom so that I can address you orally. I will always first disclose to the attorneys your question and my response before I answer your question.

SIGNED at Houston, Texas, this 11th day of July, 2001.

/s/ Melinda Harmon
MELINDA HARMON
UNITED STATES DISTRICT JUDGE

APPENDIX K

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
FILED
07/11/01
MICHAEL N. MILBY, CLERK
BY DEPUTY /s/ H. Tippen

COMPAQ COMPUTER CORPORATION,

Plaintiff,

vs. CIVIL ACTION NO. H-97-1026

ERGONOME INCORPORATED,
STEPHANIE L. BROWN, and THOMAS
MOWREY,

Defendants.

SPECIAL INTERROGATORY JURY FORM

You must return answers to each of the questions that you are asked according to the specific explanations and instructions, if any, contained therein.

Answer "yes" or "no" to the following questions unless otherwise instructed. A "yes" answer must be based on a preponderance of the evidence. If you do not find that a preponderance of the evidence supports a "yes" answer, then answer "no". In order to answer any question, you must unanimously agree among yourselves.

/s/ Melinda Harmon
MELINDA HARMON
UNITED STATES DISTRICT COURT

INTERROGATORY ONE

Did Compaq in its 1994 *Safety & Comfort Guide* actually copy from Ergonome's *The HAND Book*?

Answer "Yes" or "No."

Answer: YES

Ergonome has the burden of proof on this issue.

If you have answered "yes" to Interrogatory One, then answer Interrogatory Two. If you answered "no" to Interrogatory One, answer Interrogatory Three.

INTERROGATORY TWO

Is Compaq's 1994 *Safety & Comfort Guide* "substantially similar," as that concept has been explained to you, to *The HAND Book*?

Answer "Yes" or "No."

Answer: YES

Ergonome has the burden of proof on this issue.

INTERROGATORY THREE

Did Compaq in its 1995 *Safety & Comfort Guide* actually copy from Ergonome's *The HAND Book*?

Answer "Yes" or "No."

Answer: YES

Ergonome has the burden of proof on this issue.

If you have answered "yes" to Interrogatory Three, then answer Interrogatory Four. If you answered "no" to Interrogatory One and "no" to Interrogatory Three, then answer no further interrogatories and the jury foreman should proceed to sign the certificate attached to the end of these instructions.

INTERROGATORY FOUR

Is Compaq's 1995 *Safety & Comfort Guide* "substantially similar," as that concept has been explained to you, to *The HAND Book*?

Answer "Yes" or "No."

Answer: YES

Ergonome has the burden of proof on this issue.

If you have answered Interrogatories One and Two "yes" or Three and Four "yes", then answer Interrogatory Five. If not, answer no further interrogatories and the jury foreman should proceed to sign the certificate attached to the end of these instructions.

INTERROGATORY FIVE

Was Compaq's copying of original portions of *The HAND Book de minimis* as that concept has been explained to you?

Answer "Yes" or "No."

Answer: YES

Compaq has the burden of proof on this issue.

INTERROGATORY SIX

Was Compaq's copying of original portions of *The HAND Book* a "fair use" as that concept has been explained to you?

Answer "Yes" or "No."

Answer: YES

Compaq has the burden of proof on this issue.

CERTIFICATE

We the jury find in this case, unanimously, as indicated in the answers to the foregoing Interrogatories.

7-11/01	Willie Morning
DATE	FOREMAN OF THE JURY

APPENDIX L

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
ENTERED
MAR 27 2001
MICHAEL N. MILBY, CLERK

COMPAQ COMPUTER CORPORATION,

Plaintiff,

vs. CIVIL ACTION NO. H-97-1026

ERGONOME INCORPORATED,
STEPHANIE L. BROWN, and THOMAS
MOWREY,

Defendants.

MEMORANDUM OPINION AND ORDER

Pending before the Court is Plaintiff Compaq Computer Corporation's Motion for Partial Summary Judgment With Respect to the Photographs at Issue (Inst. No. 177), Plaintiff's Motion for Partial Summary Judgment With Respect to the Words at Issue (Inst. No. 178); and Defendant Ergonome Incorporated's Cross-Motion for Summary Judgment (Inst. No. 192). After reviewing the record and the applicable law, the Court concludes that Plaintiff's partial summary judgment motion regarding the photographs should be **DENIED**, that Plaintiff's partial summary judgment regarding the words should be

DENIED, and that Defendant's cross-motion for summary judgment should be **DENIED**.

I. BACKGROUND

The present action for declaratory judgment, arising under the Copyright Act, 17 U.S.C. § 101 et seq., revolves around five books, three produced by Plaintiff Compaq Computer Corporation ("Compaq") and two produced by Defendants Ergonome Incorporated, Stephanie L. Brown, and Thomas Mowrey (referred to collectively as "Ergonome"). Ergonome's first work, *The HAND Book*, was published in 1993, and its software version, *KeyMoves*, was published in 1995. Both these books were marketed to the general public. Meanwhile, Compaq published its first work, Compaq's *Safety and Comfort Guide*, in 1994; it published the electronic version of the *Safety and Comfort Guide* in 1995; and it published a substantially updated version of the *Safety and Comfort Guide* in 1997. The three iterations of the *Safety and Comfort Guide* (referred to collectively as "*Guides*") were included with other materials usually provided to purchasers of Compaq's computers. All five works relevant to this case were similar in that they all informed computer users about ergonomics related to computer use, and about how to maintain comfortable and healthy postures while working in front of computers. The crucial question at the heart of this litigation is whether Compaq, in its three *Guides*, infringed the copyrighted material in Ergonome's *The HAND Book* and *KeyMoves*.

The origins of this case reach back almost ten years. Stephanie Brown ("Brown") was a concert pianist who, in the latter half of 1992, began writing a book on preventing repetitive stress injuries, such as carpel [sic] tunnel syndrome, with respect to computer keyboard use. Brown registered this book with the Copyright Office at various stages of its creation during 1992 and 1993. In September 1993, Brown formed Ergonome for the purpose of publishing and marketing *The HAND Book*. As part of the formation of Ergonome, Brown assigned all right, title, and interest in *The HAND Book*, including the copyrights associated with it, to Ergonome.[13] Ergonome states that at all times it complied in all respects with the Copyright Act, 17 U.S.C. § 504, and all other laws governing copyright.

During roughly the same time period, Compaq was seeking to replace its 1991 booklet titled Creating a Comfortable Work Environment, which had addressed many of the same ergonomics issues presented in Ergonome's *The HAND Book*, because Compaq desired to provide its end users with greater information on avoiding keyboard-related injuries. As part of this effort to create a new booklet, Compaq obtained many reference materials bearing on hand injuries and computer use. One of the reference materials was *The HAND Book* from Ergonome. Shortly thereafter, Compaq, through the manager of its Human Factors group, Cynthia Purvis, requested a license from Ergonome that would allow Compaq to "bundle"(i.e., supply) a copy of *The HAND Book* with every Compaq computer sold. No licensing agreement was eventually entered, however. Rather, unknown to Ergonome, Compaq developed the 1994 Guide throughout the time of Ergonome and Compaq's negotiations, a booklet which covered essentially the same subject matter as *The HAND Book*.

During Compaq and Ergonome's talks regarding *The HAND Book*, the two companies also discussed the possible bundling of Ergonome's *KeyMoves*, a complementary software product to *The HAND Book*. Ergonome states that it was at a meeting to discuss a possible licensing of *KeyMoves* that Ergonome first became aware of the existence of Compaq's 1994 Guide. Ergonome further states that, although it immediately recognized the infringing nature of the 1994 Guide, it did not raise the issue because it was still interested in pursuing the licensing of *KeyMoves* to Compaq.

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[13] All subsequent filings with the Copyright Office for *The HAND Book* and *KeyMoves* list Ergonome as the Copyright Claimant.

When it became clear that no deal on either *The HAND Book* or *KeyMoves* would materialize, the specter of litigation loomed between Ergonome against Compaq. As a result, Compaq filed the instant action on March 28. 1997 in this Court, seeking a declaration that its 1994 Guide (and its 1995 electronic version) does not, as a matter of law, infringe on Ergonome's HAND Book or *KeyMoves.* Meanwhile, Ergonome brought suit against Compaq for infringement in the Southern District of New York, which subsequently transferred the infringement action to this Court. Recognizing that the same issues of law and fact permeated through both causes of action, the Court consolidated both cases by Order dated August 22, 2000.

II. STANDARD OF REVIEW

Under Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment is appropriate when the pleadings and record evidence show that no genuine issue of material facts exists and that, as a matter of law, the movant is entitled to judgment. Little v. Liquid Air Corp., 37 F.3d 1069, 1075 (5th Cir.1994). "The substantive law will identify which facts are material." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). Only disputes about material facts will preclude the granting of summary judgment. *Id.* In a motion for summary judgment, the burden is on the movant. *Latimer v. Smithkline & French Lab.*, 919 F.2d 301, 303 (5th Cir. 1990). If the non-movant bears the burden of proof at trial, however, the movant for summary judgment need not support the motion with evidence negating the opponent's case. Instead, the movant may satisfy its burden by showing that there is an absence of evidence to support the non-movant's case. *Id.*; *Little*, 37 F.3d at 1075.

Once the movant makes this showing, the burden shifts to the non-movant to show that summary judgment is not appropriate. *Little*, 37 F.3d at 1075 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986)). "This burden is not satisfied with 'some metaphysical doubt as to the material facts,' . . . by 'conclusory allegations,' . . . by 'unsubstantiated assertions,' or by only a 'scintilla' of evidence." *Id.* (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 89 L. Ed. 2d 538, 106 S. Ct. 1348, (1986); *Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 871-73, 111 L. Ed. 2d 695, 110 S. Ct. 3177 (1990); *Hopper v. Frank*, 16 F.3d 92, 97 (5th Cir. 1994); *Davis v. Chevron U.S.A., Inc.*, 14 F.3d 1082, 1086 (5th Cir. 1994)). Rather, the non-moving party must "come forward with 'specific facts showing that there is a genuine issue for trial.'" *Matsushita*, 475 U.S. at 587 (quoting FED. R. CIV. P. 56(e)). In determining whether a genuine issue for trial exists, the court must view all of the evidence in the light most favorable to the non-movant. *Richter v. Merchants Fast Motor Lines, Inc.*, 83 F.3d 96, 98 (5th Cir. 1996) (per curiam); *Gremillion v. Gulf Coast Catering Co.*, 904 F.2d 290, 292 (5th Cir. 1990).

III. DISCUSSION

It is axiomatic that any claim of copyright infringement depends on two primary elements: (1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original. *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 361, 111 S. Ct. 1282, 113 L. Ed. 2d 358 (1991) (citing *Harper & Row Publishers, Inc. v. Nation Enter.*, 471 U.S. 539, 548, 85 L. Ed. 2d 588, 105 S. Ct. 2218 (1985)); *Peel & Co., Inc. v. Rug Market*, 238 F.3d 391, 394 (5th Cir. 2001) (citing *Alcatel USA, Inc. v. DGI Technologies, Inc.*, 166 F.3d 772, 790 (5th Cir. 1999)). For the purposes of the present motions for partial summary judgment, Compaq does not contest Ergonome's ownership of a valid copyright or Compaq's copying. Rather, Compaq argues that the words and pictures at issue in this case are uncopyrightable, or, if they are copyrightable, Compaq did not commit any unlawful infringement.

The Court addresses the copyrightability issue first. Compaq takes the position that the textual material at issue in *The HAND Book* and *KeyMoves* comprise uncopyrightable words, fragments, and short phrases that are dictated "solely by functional considerations." (Mem. in Support of Mots. for Partial Summ J. at 11.) Compaq thus essentially argues that Ergonome's expression is not original enough to warrant copyright protection because it consists of "straightforward terms" where "the available variations in wording are quite limited." *Matthews v. Freedman*, 157 F.3d 25, 28 (1st Cir. 1998). Relatedly, Compaq also invokes the doctrines of merger and scenes a faire and contends that Ergonome's expression "is so intimately linked with an idea that to grant protection to the expression is equivalent to giving a monopoly on the idea itself." (Mem. in Support of Mots. for Partial Summ J. at 16.)

In response, Ergonome files its own partial summary judgment motion and, unsurprisingly, insists that words and pictures are indeed copyrightable. First, Ergonome calls attention to its ownership of U.S. copyright registrations in *The HAND Book* and the *KeyMoves* software, pointing out that such ownership gives rise to a presumption of copyrightability. See *Fonar v. Domenick*, 105 F.3d 99, 104 (2nd Cir. 1997) (holding that ownership of a copyright registration gives rise to a rebuttable presumption that the work in question is copyrightable); see also 17 U.S.C. § 410(c) ("A certificate of copyright registration is prima facie evidence that the copyright is valid."). Second, Ergonome's criticizes Compaq's very framework of analysis: while Compaq "dismembers" Ergonome's expressions into component words and phrases, Ergonome maintains that it is the very arrangement and selection of the words and pictures as a coherent whole that gives rise to copyright protection. (Opp. To Mots. for Partial Summ. J. and Cross-Mot. for Partial Summ. J. at 6.) In other words, while Compaq focuses on "the sum of the parts" in *The HAND Book* and *KeyMoves*, Ergonome argues that the more correct inquiry focuses on "the whole" of the expression.

The Court finds that Ergonome takes the better view, for a proper analysis of copyrightability centers on the overall organization and form of Ergonome's words and depictions rather than on their component parts. That Ergonome owns copyright registrations in *The HAND Book* and *KeyMoves* is of no moment in this case, because it is well established that "the mere fact that a work is copyrighted does not mean that every element of the work may be protected." *Feist*, 499 U.S. at 348; *Kepner-Tregoe, Inc. v. Leadership Software, Inc.*, 12 F.3d 527, 533 (5th Cir. 1994) (holding that a plaintiff's holding of a copyright over materials "does not mean that all aspects of those materials are automatically protected").

Instead, the true touchstone of copyrightability is originality. *Kamar Intern., Inc. v. Russ Berrie and Co.*, 657 F.2d 1059, 1061 (9th Cir.1981) ("Originality is the indispensable prerequisite for copyrightability."). The originality inquiry centers not on the inherent originality of a work's ideas, however, because no idea is copyrightable. See *Mazer v. Stein*, 347 U.S. 201, 217, 98 L. Ed. 630, 74 S. Ct. 460 (1954) ("[A] copyright gives no exclusive right to the art disclosed; protection is given only to the expression of the idea--not the idea itself."). Rather, the inquiry focuses on the manner in which the ideas are expressed, which often depends on how the component parts of the expression are arranged and are related to one another, see *Roth Greeting Cards v. United Card Co.*, 429 F.2d 1106, 1109 (9th Cir. 1970) (holding that copyrightability often depends on "text, arrangement of text, art work, and association between art work and text . . . as a whole"). As the Supreme Court explained in *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, Inc., "Common sense tells use that 100 uncopyrightable facts do not magically change their status when gathered together in one place. Yet copyright law seems to contemplate that compilations that consist exclusively of facts are potentially within its scope." 499 U.S. at 345. In other words, arrangements of uncopyrightable ingredients may indeed be copyrightable. The key is whether the overall form of the expression is original, for "if the selection and arrangement are original, these elements of the work are eligible for copyright protection." *Feist*, 499 U.S. at 349.

The bar for "originality" in a copyrightability analysis is not high. As the *Feist* Court explained:

> Original, as the term is used in copyright, means only that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity. To be sure the requisite level of creativity is extremely low; even a slight amount will suffice. The vast majority of works make the grade quite easily, as they possess some creative spark, "no matter how crude, humble or obvious" it might be.

Id. at 345 (citations omitted). Thus, if an author's particular expression of an idea clears the relatively low hurdle of originality, his work his copyrightable.

Compaq, however, urges the Court to disregard the *Feist* principle of "selection and arrangement" because the disputed work in *The HAND Book* and *KeyMoves* does not constitute a "compilation" per se. Title 17 U.S.C. § 101 defines a compilation as "a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship." 17 U.S.C. § 101. It is undisputed that *The HAND Book* and *KeyMoves* were not officially registered as compilations, but rather, as original works. However, the Court rejects Compaq's rigid and binary conception of copyright law where copyright jurisprudence involving compilations is different than that of cases involving original works. It is a distinction that lacks a real principled difference.[14] *Cf.*, e.g., *Engineering Dynamics, Inc. v. Structural Software, Inc.*, 26 F.3d 1335, 1346 (5th Cir. 1994) (applying *Feist* to a non-compilation infringement case involving a computer software program and finding that the plaintiff had "selected data and arranged their placement in a way that is unique and original"); *Lotus Dev. Corp. v. Borland Int'l Inc.*, 831 F. Supp. 223, 231 (D. Mass.1993) finding a command menu interface copyrightable by comparing it to a compilation).

The postulate for which a "compilation case" like *Feist* stands is rather simple: a work comprising uncopyrightable elements may, through original organization and presentation, be protected by copyright law. This idea-expression dichotomy flows throughout copyright jurisprudence, and, indeed, is the very essence of it. See, e.g., *Matthews v. Freedman*, 157 F.3d 25, 27 (1st Cir. 1998) (recognizing that the dynamic between uncopyrightable ideas and copyrightable expression of those ideas represents the major tension in copyright law); *Georgia Lee Miller Roulo v. Russ Berrie & Co., Inc.*, 886 F.2d 931. 939 (7th Cir. 1989) ("While it is true that these elements are not individually capable of protection, just as individual words do not deserve copyright protection, it is the unique combination of these common elements which form the copyrighted material."); *Emerson v. Davies*, 8 F. Cas. 615. 619 (Circuit Court, D. Mass., 1845) ("He, who constructs by a new plan, and arrangement, and combination of old materials, in a book designed for instruction, either of the young, or the old, as a title to a copy-right, which cannot be displaced by showing that some part of his plan, or arrangement or combination, has been used before . . . ."). Compaq's distinction of "compilation cases" versus "original work cases" is therefore beside the point. Moreover, the Court notes that, in its Memorandum in Opposition to Ergonome's Cross-Motion for Partial Summary Judgment, Compaq asserts that "both the words and pictures of *The HAND Book* are factual" and consist only of uncopyrightable "facts." (Mem. In Opp. To Cross-Mot. for Partial Summ. J. at 17, 20.) In light of such an argument, the Court cannot help but find cases like *Feist* instructive: if the "only conceivable expression is the manner in which the compiler has selected and arranged the [uncopyrightable] facts[, and] the selection and arrangement are original, these elements of the work are eligible for copyright protection." *Feist*, 499 U.S. at 349.

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[14] While Compaq endorses the abstraction-filtration-comparison method often used in cases involving computer programs, see, e.g., *Engineering Dynamics, Inc. v. Structural Software, Inc.*, 26 F.3d 1335, 1342 (5th Cir. 1994), the Court fails to see the tension that Compaq implies between such a method and the "selection and arrangement" analysis, especially when the abstraction-filtration-comparison method is more relevant to the issue of infringement than to copyrightability. *See* 3 NIMMER, § 13.03[F] at 13-102.17 (stating that the purpose of abstracting a work into successive levels of generality is to "help a court separate ideas [and processes] from expression and eliminate from the substantial similarity analysis those portions of the work that are not eligible for copyright protection" (emphasis added)). Moreover, the Court finds that Ergonome's work, even when analyzed under the abstraction method, is copyrightable. While the purpose or idea found in *The HAND Book* and *KeyMoves* is certainly not copyrightable, the particular formatting, arrangement, and selection of the words expressing the idea are. In other words, the Court counts Ergonome's words as expressions of ideas, not the ideas themselves. See *Id.* at 1345 (using the abstraction analysis and concluding that the computer formats at issue convey an expression, rather than merely an idea).

The Court also rejects Compaq's recurring argument that *The HAND Book* and *KeyMoves*'s words and phrases are so short and fragmentary that copyright protection cannot exist a matter of law. Compaq inappropriately fixates on the number of letters in the words found in *The HAND Book* and *KeyMoves*, and even goes so far as to point out that "only about twenty-five even remotely . . . substantive" words appear in the work at issue. (Mem. in Support of Mots. for Partial Summ. J. at 12 n.8.) Merely because words such as "minimum," "optimum," "natural," "line," and the like are, in of themselves, uncopyrightable, it does not necessarily follow that a particular arrangement of those words to express an idea in a particular manner is uncopyrightable. See *Roulo*, 886 F.2d at 939 (holding that, although "individual words do not deserve copyright protection, it is the unique combination of these common elements which form the copyrighted material"). Atomistic parsing is inappropriate in this copyright inquiry; copyrightability of text turns not on the number of letters in its component words, or on the words themselves (for no common word may be copyrighted, see *Id.*), but rather, on whether the relationship of the words evinces a modicum of creativity by the author. As explained in *Ornelas v. J. Racenstein & Co.*, 2001 U.S. Dist. LEXIS 879, No. 00 CIV. 01511(JSM), 2001 WL 91628 (S.D. N.Y. Feb. 2, 2001),

> A review of the relevant case law demonstrates . . . that simply because a name, title or slogan is short does not necessarily render it outside the realm of copyright. Rather, the governing principle of law embodied by the Copyright Office regulation is that short words and phrases tend to be too trivial or insignificant to exhibit the minimal level of creativity necessary to warrant copyright protection.
>
> . . . .
>
> Thus, the relevant question for the court is not merely whether a name, title or slogan contains some minimal number of words. Rather it is whether the phrase contains some appreciable level of creativity, however few words it may contain.

Id. at *1 (emphasis added). Accordingly, "not all short, declarative sentences fall" within the Federal Code's exception to copyright protection. *CMM Cable Rep., Inc. v. Ocean Coast Prop., Inc.*, 97 F.3d 1504, 1520 n.20 (citing

Applied Innovations v. Regents of the Univ. of Minn., 876 F.2d 626, 635 (8th Cir.1989)).

In the instant case, the crucial question then becomes obvious: does the particular selection of words and images in Ergonome's work evince the requisite originality to afford it copyright protection? The Court finds that it does.[15] In *The HAND Book*, Ergonome writes:

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[15] Courts have disagreed on whether copyrightability is a question of law to be decided by a judge or a question of fact to be decided by a jury, *American Dental Assoc. v. Delta Dental Plans Assoc.*, 1996 U.S. Dist. LEXIS 5809, No. 92 C 5909, 1996 WL 224494, at *17 (N.D. Ill. 1996), rev'd on other grounds, 126 F.3d 977; the Fifth Circuit, however, has not enunciated a rule on the matter to guide this Court. Indeed, it is a difficult and nuanced issue. Cf. *Id.* (stating that, in the Seventh Circuit, "the treatment has been inconsistent"). The Court agrees with the Seventh Circuit that "the truth . . . is somewhere in between." *Id.* In *Lotus Dev. Corp. v. Borland Intern., Inc.*, 788 F. Supp. 78 (D. Mass. 1992), Judge Keeton astutely observed that "The legal test for determining copyrightability . . . is a standard requiring an evaluative mixed law-fact determination, as distinguished from a bright-line rule calling for a finding about disputed historical facts, such as who did what, where, and when." *Id.* at 95. Nonetheless, Judge Keeton concluded that the question was one for the court because

> [a] determination that issues of copyrightability are to be resolved by juries would have such severe adverse effects on the aim of assuring that like cases are treated alike and on the complexity and cost of litigation in computer software copyright cases that in practical effect the scope of copyright protection congress manifestly intended could not be achieved. The practical certainty of many outcomes inconsistent with the congressional accommodation among highly valued but conflicting interests, manifested in the Copyright Act, weighs heavily in favor of the conclusion that treating copyrightability issues as exclusively for courts, not juries . . . .

Id. at 96. This Court agrees and decides the question of copyrightability in the instant case.

> 1. "The optimum height is one where your forearms are approximately level and parallel to the floor, with little or no bend in your wrists." (Page 17)
>
> 2. "Your elbows may or may not be touching your sides lightly, depending on your physique." (Page 22)
>
> 3. "Find the minimum amount of weight you need to push down a key and don't use more." (Page 37)
>
> 4. "Angled-wrist position--No" and "The Natural Line--Yes" (Page 14, captions to Illustrations 6 and 7)

Ergonome additionally repeatedly uses the phrases "motions or positions" and "positions and motions" (appearing on pages 2, 3, and 5), as well as its sentence, "Don't angle your wrist from side to side, cutting it off from your arm" (page 55).

With regard to the two sets of illustrations in controversy, Ergonome's *The HAND Book* includes depictions of correct and incorrect hand positions relating to a computer keyboard. The first set of illustrations, depicted in detailed photograph form, show an above-view of hands at incorrect and correct angle positions over a keyboard, and the second set of illustrations depict a profile view of hands over a keyboard. A rectangular border surrounds the two juxtaposed photographs in each set, with Ergonome's short directives appearing below as captions.

In addition, Ergonome writes in *KeyMoves*:

> 1. "Don't angle your wrists. This is uncomfortable and unnatural, and can strain your wrists."
>
> 2. "Don't angle your wrist when using your mouse."

3. "Don't point your finger stiffly when using your pointing device, and don't angle your wrist."

Although there is no question that Ergonome cannot copyright the ideas represented in the disputed work. see *Matthews*, 157 F.3d at 27, the Court finds that Ergonome has copyrighted the form of expression in which those ideas manifest. As discussed above, the touchstone for copyright is originality, and in this case, the Court holds that the seven phrases and four illustrations at issue evince the modicum of originality necessary for copyrightability. See *Feist*, 499 U.S. at 349 ("If the selection and arrangement are original, these elements of the work are eligible for copyright protection."); *Roth Greeting Cards*, 429 F.2d at 1109 (holding that, although the textual components of a greeting card were not copyrightable, "proper analysis of the problem requires that all elements of each card, including text, arrangement of text, art work, and association between art work and text, be considered as a whole"). For example, page 14 of *The HAND Book* expresses the idea that ulnar deviation of the arm during computer use is unhealthy and should be avoided, and that a neutral wrist position is more advantageous. Ergonome has expressed this idea in two clipped and simple directives, "Angled wrist position--no" and "The natural line--yes." On page 22 of *The HAND Book*, Ergonome cautions that, "Your elbows may or may not be touching your sides lightly, depending on your physique" to express the proper position a computer user's arms should have relative to his body. The fact that some of the words at issue accompany illustrations counsels even more in favor of copyrightability, for the arrangement of words in relation to each other and to the pictures goes to the originality of Ergonome's work. See *Roth*, 429 F.2d at 1109 (emphasizing the relationship between text and artwork). Moreover, several aspects of the illustrations, including the rectangular box that surrounds the depictions and the close, vertical juxtaposition of the photographs, further demonstrate the necessary creativity. Given that "the requisite level of creativity is extremely low," the Court finds Ergonome's expressions in *The HAND Book* and *KeyMoves* to be copyrightable because "they possess some creative spark, 'no matter how crude, humble or obvious' it might be." *Feist*, 499 U.S. at 345 (citations omitted).

By way of contrast, the Supreme Court in *Feist* opined that a telephone company's residential white pages was not copyrightable because the arrangement of names and telephone numbers by alphabetical order did not display the requisite originality. As the Court in that case observed, such an arrangement was "entirely typical" and "devoid of even the slightest trace of creativity." *Feist*, 499 U.S. at 362. Sorting names by alphabet, the Court opined, "is an age-old practice, firmly rooted in tradition and so commonplace that it has come to be expected as a matter of course." *Id.* at 363. "It is not only unoriginal, it is practically inevitable." *Id.* In the instant case, this Court finds that Ergonome's specific expression is not so typical, expected, or inevitable to preclude copyrightability. Rather, the seven phrases and four illustrations at issue in *The HAND Book* and *KeyMoves* show originality sufficient for copyright protection.

The Court necessarily also rejects Compaq's merger and scenes a faire arguments. Under the related doctrines of merger and scenes a faire, copyright protection does not extend to expression that is so intimately linked with an idea that to grant protection to the expression is equivalent to giving a monopoly on the idea itself. See *Kepner-Tregoe*, 12 F.3d at 533 ("When an idea can be expressed in very few ways, copyright law does not protect that expression, because doing so would confer a de facto monopoly over the idea. In such cases, idea and expression are said to be merged."); *Morrissey v. Procter & Gamble Co.*, 379 F.2d 675, 678-79 (1st Cir. 1967) (appreciating that, "by copying a mere handful of forms, a party could exhaust all possibilities of future use of the substance [of the idea]"). For merger and scenes a faire to apply, it is not necessary that there be only one single way of expressing an idea; rather, it is sufficient that the varieties of expression are limited. See Morrissey, 379 F.2d at 678; see also, e.g., *Mitek Holdings, Inc. v. Arce Eng'g Co., Inc.*, 89 F.3d 1548, 1557 n.20 (11th Cir. 1996). While Compaq insists that there are only a limited number of ways to convey "forearms," "level," "parallel to the floor," "elbows," "minimum amount," and the like, such an argument revisits Compaq's claim that Ergonome has attempted to copyright certain, specific words. Again, this is not the proper frame of analysis because it focuses on the individual words rather than on the overall expression comprising those words. The question is more appropriately: are there only a limited number of ways to express, for example, the idea that "ulnar deviation of the arm during computer use is unhealthy and should be avoided, and that a neutral wrist position is more advantageous"? The Court finds that Ergonome's particular expression of this idea, manifested as simple, clipped directives ("the natural line--yes" and "the angled line-no") accompanying specific, detailed illustrations, displays enough originality to separate it from mere generic expression.

Indeed, the record indicates this to be so. In its Opposition to Motions for Partial Summary Judgment, Ergonome points out the various ways in which other computer companies and authors have expressed the ideas in controversy here. For example, in IBM Corporation's *A Critical Literature Review of Human Factors Studies of Split Keyboards*, 1926-1993, IBM employs basic pictographs and speaks in terms of "neutral wrist position" and "ulnar deviation." In Hewlett-Packard Company's *Working in Comfort with Your HP Computer Equipment*, Hewlett-Packard cautions "that you should not bend your wrists more than 10 degrees up or down, or more than 10 degrees sideways." In *Keyboard Price Reductions Overshadow New Designs*, CTDNews simply provides rudimentary shapes to express correct arm and wrist positioning, without using any words at all. LRP Publications, meanwhile, cautions its readers not to "do the twist" with their wrists. While all these books and manuals express the same essential idea, the form or expression in which that idea manifests differs widely, tangibly demonstrating that Ergonome's particular expression is not so generic that it is merged with the ideas represented.

Having determined that copyrightability exists in this case, the Court now considers the second issue raised by Compaq in its motions for partial summary judgment: whether there was infringement on Ergonome's copyright. Compaq specifically argues that no unlawful infringement exists here because any copying on its part, assuming such copying exists, was *de minimis* and within the bounds of fair use. With regard to Compaq's *de minimis* argument, the Second Circuit has explained that the concept of *de minimis* has three significant aspects:

> First, *de minimis* in the copyright context can mean what it means in most legal contexts: a technical violation of a right so trivial that the law will not impose legal consequences . . . . In *Knickerbocker Toy Co. v. Azrak-Hamway Int'l,* Inc., 668 F.2d 699, 703 (2nd Cir. 1982), we relied on the *de minimis* doctrine to reject a toy manufacturer's claim based on a photograph of its product in an office copy of a display card of a competitor's product where the display card was never used . . . .
>
> Second, *de minimis* can mean that copying has occurred to such a trivial extent as to fall below the quantitative threshold of substantial similarity, which is always a required element of actionable copying. . . .
>
> Third, *de minimis* might be considered relevant to the defense of fair use. One of the statutory factors to be assessed in making the fair use determination is "the amount and substantiality of the portion used in realtion [sic] to the copyrighted works as a whole," 17 U.S.C. § 107(3). A defendant might contend . . . that the portion used was mini-

> mal and the use was so brief and indistinct as to tip the third fair use factor decisively against the plaintiff.

Ringgold v. Black Entertainment Television, Inc., 126 F.3d 70, 74-75 (2nd Cir. 1997) (citations omitted). In this case, Compaq invokes the second aspect of the *de minimis* doctrine and argues that the 1994, 1995, and 1997 versions of its Guide do not cross the "substantial similarity" threshold for actionable copying. As Compaq states, "*The HAND Book* includes thousands of words. Ergonome claims similarities in Compaq's *Guides* to only about forty to fifty words, of which many are simply pronouns. Out of eighty-eight photographs, Ergonome claims similarity in only four . . . ." (Mem. in Support of Mots. for Partial Summ J. at 20.)

While Ergonome concurs with Compaq's count of the allegedly infringed words involved, Ergonome argues that because Compaq's *de minimis* argument rests on a concept of "substantial similarity," the question inherently calls for a determination made by the trier of fact. Alternatively, Ergonome quotes its expert witness, Professor Arthur R. Miller, and argues that Compaq's copying is not *de minimis* as a matter of law. As Professor Miller observes,

> In [*Harper & Row Publishers, Inc. v. Nation Enter.*, 471 U.S. 539, 85 L. Ed. 2d 588, 105 S. Ct. 2218 (1985)], the Supreme Court found copying that was not *de minimis* when 300 words from President Ford's memoirs were used in a 2,000-word article, which is also fifteen percent (15%). I also understand that the expression which Compaq allegedly took from those 4 pages comprises approximately 3 out of 100 pages in Ergonome's book, or three percent (3%). In *Harper & Row*, the 300 words were taken from a 200,000-word book, which constitutes fifteen-hundredths of one percent (0.15%). If fifteen-hundredths of one percent

> (0.15%) of the infringed work is not a *de minimis* taking of Harper & Row's book, then a three percent (3%) taking of Ergonome's book, which is 20 times as much, could not be found to be *de minimis*, as a matter of law.

(Decl. Of Arthur R. Miller at P 12.) Even assuming Professor Miller's declaration to be competent summary judgment evidence in this case, the Court rejects the argument, for Professor Miller's position essentially advances a rigid calculus that determines, as a matter of law, a *de minimis* inquiry; neither Ergonome nor Professor Miller points the Court to any case law that endorses such a strict arithmetical formula. Moreover, that Harper & Row involved 300 to 400 words that were "verbatim quotes of the author's original language," *Harper & Row*, 471 U.S. at 548-49, further counsels against a strict adoption of the Supreme Court's analysis to the facts of the instant case.

Rather, the Court finds the *de minimis* issue, and the question of "substantial similarity" that underlies it, to be one for the trier of fact. Compaq does not challenge copying for the purposes of the pending motions for partial summary judgment. As a result, the *de minimis* question becomes, then, "whether copying has occurred to such a trivial extent as to fall below the quantitative threshold of substantial similarity, which is always a required element of actionable copying." *Ringgold*, 126 F.3d at 74 (citation omitted). The principle of "substantial similarity" is relevant to a *de minimis* inquiry because substantial similarity "requires that the copying is quantitatively and qualitatively sufficient to support the legal conclusion that infringement (actionable copying) has occurred." *Id.* (emphasis added).

The Court rejects Compaq's *de minimis* argument because Compaq primarily focuses only on the quantitative component, to the disregard of the qualitative. See *Id.* Sheer numbers alone will not preclude a finding of infringement. As stated in *Nester's Map & Guide Corp. v.*

Hagstrom Map Co., 796 F. Supp. 729 (E.D. N.Y. 1992). the concept of *de minimis* does not mean "that copying copyrighted material is proper so long as the copying, though significant, is done in moderation." *Id.* at 734 (citing *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49, 56 (2nd Cir.1936) ("no plagiarist can excuse the wrong by showing how much of his work he did not pirate")). Nor can a plagiarist excuse the wrong by showing how much of the copied work he did not pirate. *Cf. Warner Bros., Inc. v. American Broadcasting Cos.*, 720 F.2d 231, 242 (2nd Cir.1983) (holding that *de minimis* rule allows "literal copying of a small and usually insignificant portion of the plaintiff's work"). Rather, *de minimis* copyright infringement, properly understood, is a taking that "is so meager and fragmentary that the average audience would not recognize the appropriation." *Fisher v. Dees*, 794 F.2d 432, 435 (9th Cir. 1986). The *de minimis* question is thus one for the trier of fact, who must determine not only whether Compaq's alleged infringement is numerically *de minimis* but qualitatively *de minimis* as well. See *Ringgold*, 126 F.3d at 74-75; *CyberMedia, Inc. v. Symantec Corp.*, 19 F. Supp. 2d 1070, 1077 (N.D. Cal. 1998) (analyzing the *de minimis* standard and holding that "even if a copied portion be relatively small in proportion to the entire work, if qualitatively important, the finder of fact may properly find substantial similarity").

The Court additionally rejects Compaq's motion for partial summary judgment premised on the concept of "fair use." Compaq points out that the fair use doctrine "permits court to avoid rigid application of the copyright statute when . . . it would stifle the very creativity which that law is designed to foster." *Iowa State Univ. Research Foundation, Inc. v. American Broad. Co.*, 621 F.2d 57, 60 (2nd Cir. 1980). While a fair use determination is intimately bound by the particular facts of a given case, *Harper & Row*, 471 U.S. at 539, four non-exclusive factors inform the inquiry. Those factors are: (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work. 17 U.S.C. § 107; *Wright v. Warner Books, Inc.*, 953 F.2d 731, 735-36 (2nd Cir. 1991). In its partial summary judgment motion, Compaq argues that each of these factors favors the conclusion that Compaq's copying of *The HAND Book* and *KeyMoves* was within the bounds of fair use.

The Court disagrees, finding the matter subject to genuine issues of material fact. In particular, the Court finds the first, second, and fourth factors highly fact-intensive questions that must be answered by the fact-finder. Moreover, even though Compaq argues that its distribution of its *Guides* along with each computer sold was merely instructional and not commercial, the Court notes that a work that provides a social benefit is not automatically shielded from copyright law. As the Supreme Court opined in Harper & Row, "to propose that fair use be imposed whenever the 'social value [of dissemination] . . . outweighs any detriment to the artist,' would be to propose depriving copyright owners of their right in the property precisely when they encounter those users who could afford to pay for it." *Harper & Row*, 471 U.S. at 559 (citations omitted). Assuming arguendo that no genuine issue of material fact exists as to the non-commercial character of Compaq's book distributions, "the crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price." *Id.* With this framework in mind, the Court finds summary judgment on the fair use issue inappropriate.

The Court now turns to Ergonome's cross-motion for partial summary judgment, in which Ergonome urges the Court to hold that Compaq's 1994, 1995, and 1997 *Guides* are "substantially similar" to (and thus infringing on) *The HAND Book* and *KeyMoves* software. Recognizing that Ergonome's "substantially similarity" argument here is closely related to its argument on the *de minimis* issue, the Court declines Ergonome's request for summary judgment because genuine issues of material fact exist on the matter.

It is well established that to prevail on a copyright infringement claim, a plaintiff must show substantial similarity between the two works. *Peel & Co, Inc. v. Rug Market*, 238 F.3d 391, 395 (5th Cir. 2001); *Alcatel USA, Inc. v. DGI Technologies, Inc.*, 166 F.3d 772, 790 (5th Cir. 1999). "Substantial similarity" is usually determined by the "ordinary observer" test. *Durham Indus., Inc. v. Tomy, Corp.*, 630 F.2d 905, 911 (2nd Cir. 1980). "To determine whether an instance of copying is legally actionable, a side-by-side comparison must be made between the original and the copy to determine whether a layman would view the two works as 'substantially similar.'" *Creations Unlimited, Inc. v. McCain*, 112 F.3d 814, 816 (5th Cir. 1997). Moreover, the layman "must detect piracy 'without any aid or suggestion or critical analysis by others. The reaction of the public to the matter should be spontaneous and immediate.'" Peel & Co., 238 F.3d at 398 (quoting *Harold Lloyd Corp. v. Wituer*, 65 F.2d 1, 18 (9th Cir. 1933)). By definition, "the copying need not be of every detail so long as the copy is substantially similar to the copyrighted work." *Durham*, 630 F.2d at 912 (quoting *Comptone Co. v. Rayex Corp.*, 251 F.2d 487, 488 (2d Cir. 1958)).

This is an inquiry "typically . . . left to the factfinder," and summary judgment is only appropriate if the Court can conclude, after viewing the evidence and drawing inferences in a manner most favorable to the nonmoving party, that no reasonable juror could find substantial similarity of ideas and expression. *Peel & Co.*, 238 F.3d at 395; see also *Herzog v. Castle Rock Entertainment*, 193 F.3d 1241, 1247 (11th Cir. 1999) ("Summary judgment historically has been withheld in copyright cases because courts have been reluctant to make subjective determinations regarding similarity between two works.")

In the instant case, the Court finds that a reasonable juror could fail to find substantial similarity between Ergonome's *The HAND Book* and *KeyMoves* on one hand, and Compaq's 1994, 1995, and 1997 *Guides* on the other. The Court's holding applies to both the textual and pictorial content of the expressions at issue. While the relevant portions of Ergonome and Compaq's works in this case all convey the same ideas, a material fact issue exists as to whether substantial similarity is satisfied. See *Peel & Co.*, 238 F.3d at 394 ("A fact issue is material if its resolution could affect the outcome of the action."). For example, Ergonome points out that Compaq places a hyphen in the compound adjective "angled wrist" in a manner similar to that found in *The HAND Book*, however, copyright law does not say with certainty that such a similarity constitutes the substantial similarity required for actionable infringement. Also, while much of the disputed text in *The HAND Book* is presented in paragraph form, Compaq's allegedly infringing words are presented as bullet points. Even the pictures found in the parties' books, while undoubtedly similar, raise a fact issue as to whether they are similar enough to remove any doubt of Compaq's non-infringement. As the Eleventh Circuit appreciated, an inquiry such as this is inherently subjective. *Herzog*, 193 F.3d at 1247. Summary judgment for Ergonome is thus inappropriate.

IV. CONCLUSION

For the reasons assigned above, the Court holds that Ergonome's textual and pictorial expression in *The HAND Book* and *KeyMoves* is copyrightable because it evinces the required modicum of originality for copyright protection. Whether Compaq has infringed Ergonome's copyright, however, is a question left for the trier of fact because genuine issues of fact exist as to whether Compaq's copying was *de minimis*, within the bounds of fair use, or substantially similar to Ergonome's copyrighted work.

Accordingly, the Court

ORDERS that Compaq's Motion for Partial Summary Judgment With Respect to the Photographs at Issue is **DENIED**;

ORDERS that Compaq's Motion for Partial Summary Judgment With Respect to the Words at Issue is **DENIED**; and further

ORDERS that Ergonome's Cross-Motion for Summary Judgment is **DENIED**.

SIGNED at Houston, Texas, this 26th day of March, 2001.

/s/ MELINDA HARMON

UNITED STATES DISTRICT JUDGE

APPENDIX M

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
FILED
JUL 23 2001
Michael N. Milby, Clerk of Court

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

COMPAQ COMPUTER CORPORATION,

Plaintiff,

vs.

ERGONOME, INC., STEPHANIE L. BROWN, and THOMAS MOWREY,

Defendants.

CIVIL ACTION NO. H-97-1026

Houston, Texas

6/29/2001
3:15 p.m.

VOLUME II
PRETRIAL HEARING

BEFORE THE **HONORABLE JUDGE MELINDA HARMON**
UNITED STATES DISTRICT JUDGE

REPRESENTING

THE PLAINTIFF: MICHAEL O. SUTTON
MATTHEW REEVES
ROD COOPER

THE DEFENDANTS:	ARNOLD ANDERSON VICKERY PAUL F. WALDNER, III
Court Reporter:	Anne Traylor, CSR, RPR Official Court Reporter 515 Rusk, Room 8016 Houston, Texas 77002

PROCEEDINGS REPORTED BY MECHANICAL STENOGRAPHY
TRANSCRIPT PRODUCED BY COMPUTER-AIDED TRANSCRIPTION

(Pages 2-129 omitted)

THE COURT: Okay. Good.

MR. VICKERY: Are you going to either issue an order, Your Honor, or tell us what kind of damage we're going to --

THE COURT: I'll tell you what, I know that you-all want that and I will, but I think we need to take about a five-minute recess and then we'll come back and I'll talk to you about that.

MR. VICKERY: Okay.

(Recess taken.)

THE COURT: I've been working on this for -- since you-all brought it up yesterday and I'm trying to get a handle on what you-all are saying and these are my thoughts about the damages.

The first thing is that, and I've read this -- the On-

Davis case over and over trying to cling the wisdom from that case, as I was asked to do yesterday; and I think that the On-Davis case makes many points that are helpful to a determination in this case.

As far as actual damages are concerned, the only theory that has really been developed by the plaintiffs is you take some amount of money that the book was worth, you multiply that times the number of computers Compaq sold during that period of time, and you come up with a number that you then -- from which you deduct the cost of printing books and you come up with the damages. And that's my impression from reading the pretrial order. That's what the model is.

And Mr. Sutton objects to that damage model for a number of reasons but primarily because he says that to use that damage model does not reveal a -- there is no connection between the infringement and the damages that were suffered. So -- and I think he's right about that.

The problem I see is that you have a -- if there was an infringement, if the jury found that there was an infringement, we're not talking about the book. We're talking about a part of the book and not a tremendously large part of the book, in terms of quantity, perhaps a large part of the book in terms of quality; but in any event, there is no -- there is no evidence to let us put a number on what is the value of that part of the book that is infringed.

So, to use the whole number of the book, I think, would be analogous to the On-Davis plaintiffs in the On-Davis case trying to recover one point, whatever it was, a million dollars for The Gap using one photograph of some

-- of their jewelry. And it was characterized more than once in the On-Davis case by the court as a wildly inflated number. And I think that that would be what the result would be if I allowed evidence of, here is what the book

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sold for. Here is how many computers Compaq sold. Deduct the costs of the book and, jury, that's your number. I think that's wildly inflated, and the problem I see it is we don't have anything else.

Now, there was an argument made yesterday that there should be a license -- we should look at a license, and, of course, the objection to that is it's not in the pretrial order; and it isn't in the pretrial order. The argument made that somehow there is reference that Compaq's license was a reference to -- that the license of the material is rather a reference to Compaq's licensing its book to other -- to others without a fee.

I mean, they weren't -- the plaintiffs want to get a recovery for the publication, if you will, of this by other companies because of Compaq's book which infringes parts of their book. So, there is really -- there is no development of any kind of license fee; but even if there were, even if they had put it in there, we also, as an alternative, would like to try to show what the license would be. We don't have any evidence of what the fair market value would be of this license, what would a willing buyer pay a willing seller, et cetera. We don't have any -- there's no evidence of that.

All we have is three numbers of what this book sold for on several -- on three different occasions and we

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know how much it cost to print it and that's all we've got in terms of -- and so, I just don't see how we can do anything but speculate as to what the license would be.

And then yesterday the young man that argued that, well, we don't have to worry about that because there are cases that say, well, if you call up and say, I'd like to try to license your material and a licensing proposal is sent back and there is a number in it, well, that number is all the number we've got; so, that's good enough. Well, we've got a lot of problems with that in this case.

First of all, there wasn't ever any real negotiation about a license. The word "license" may have been stuck in a letter someplace, but they never talked about a license.

They were always talking about selling the physical book to Compaq for some amount of money to be bundled with the computer. That's the first problem.

The second problem is we don't have a situation in which Compaq called them up and said, we would like to license your book, send this back a proposal and there is a proposal but they never back to them. Well, we don't have that.

All we have is a letter saying, this is what we'd basically like to sell you the book for, this 7.95. And then I don't think you could analogize those two situations and say, well, the fact that Compaq didn't get back with them somehow they're stuck with that 7.95 number.

And there is just nothing else, and I just don't -- I mean; I don't want to do this, but I just don't see how you've got anything but statutory damages in this case.

MR. VICKERY: Your Honor, I know you've been struggling with it but -- may I be heard?

THE COURT: Sure.

MR. VICKERY: I mean, it's 7:00 clock on a Friday night; and you've been busy all day, I know, with other things and with that. But, you know, if we're stuck with statutory damages in this case, consider the ramifications. Statutory damages are for infringement. Maybe we've got 20 or 21 separate acts of infringement with all the foreign translations. So, we're talking about, with the willfulness, $3 million. Is that right, $3 million or six? With the willfulness finding.

This kind of ruling, I mean, it -- I guess I'm puzzled how the Court could read On-Davis and come away with that notion. We have, from the get-go, pled actual damages. We have said, from the get-go, right there in the pretrial order, the courts give wide discretion to what constitutes actual damages. If you look at the On-Davis opinion, it uses about 12 different phrases. It talks about lost

profits, lost revenues. One of the phrases that we like because it's so common sense is, whatever the fee was they were entitled to exact for this.

It cites Harper and Rowe. The only Supreme Court case it cites is saying, there is an indication from the Supreme Court that what we're talking about when we say, you can't steal with impunitive (sic), the Supreme Court talks about the customary price.

It talks about license fees. It talks about royalty fees. I mean, it literally uses -- I made a list of them today -- 10 or 12 different terms, all of which relate to actual damages, which is all we've pled all along. We have always said it is a per copy basis.

Now, to say that, well, an infringer can infringe, and if they just take a little part or some part, then they can do so with impunity, for their only liability is for statutory damages, which are incredibly meager. To say that was absolutely contrary to the philosophy that it should be more expensive for them to infringe than to negotiate.

So, we have nothing but the starting price at 7.95 that was offered because that is the price at which it was offered to them; and Mr. Kramarsky went through a dozen cases where people -- the courts have allowed the offering price of the -- of whatever was offered.

THE COURT: License. Those are license cases.

MR. VICKERY: Well, sometimes they use license. Sometimes they use profits. I mean, even the On-Davis court -- the whole point is that it's not -- it doesn't matter what adjective we use, what nouns we use, what pigeonhole we put it in. The statutory measure is actual damages, and on March 27th what this Court wrote was that no plagiarist can excuse their piracy by showing how much they did not take.

And yet, today, you're -- it sounds like what you're inclined to do is say, well, but if you just took a little bit, if Mr. Plagiarist you only pirated a little bit, then you don't have to respond in actual damages. You only have to respond in statutory damages.

THE COURT: No. That's not what I'm saying. That's not what I'm saying. What I'm saying is if you -- that the plaintiff has to prove the value of the taking. That's what they've got to prove.

MR. VICKERY: I understand that. And what On-Davis says is that you are entitled to prove that what they would have to pay, what they would have to -- what you are legally entitled to charge them a fee for. Now, what we're legally entitled to charge them a fee for is what we offered them, 7.95 per copy. But they had two choices. They could say, look, that's too high. We don't want -- we don't want your whole book. We just want part of it.

In fact, you'll see in the letter there was some discussion of that very thing. But we don't have to do that. There are other alternatives in it to say, well, we're not going to infringe then.

I think that the -- my whole point yesterday was to say that it is for the trier of fact to determine from all of the available evidence and the Court's time again, say there is of necessity -- there is a quote in our brief to it -- of necessity there is some amount of speculation in the determination of the quantum of damages in copyright infringement cases and for this very reason.

But I mean, people don't -- they aren't licensed to -- and I don't mean to use license in the sense that you were; but, you know, they have no sanction to say, well, I'm just going to steal a little bit. I'm just going to copy a little bit, and then -- I mean, it's like -- it's like they went into a bookstore and took a copy of The HAND Book and said, well, I just want page 14, ripped it out and stuck it in their pocket, and then had the temerity to come into a court of law and said, well, I just took one page. That's all I should have to pay for, Judge.

The price for The HAND Book is 19.95. Don't make them -- I shouldn't have to pay 19.95. I just copied r took one page. And it's completely contrary to the theory of damages in all of the cases that we've cited. As far the pretrial order, I mean, it's parroted the pleadings that we did in our second amended, which said that the term is actual damages and that the courts are incredibly lenient in how they interpret actual damages.

Sometimes they talked about the price that we're entitled to charge for, lost revenues, or lost profits; but in terms of a pleading, a theory, we have pled within the ambit of Rule 8 actually damages.

THE COURT: I didn't say your pleadings weren't okay.

MR. VICKERY: Okay.

THE COURT: I said you didn't have any evidence.

MR. VICKERY: But we do have evidence. We do have evidence of what price we were entitled to charge them for to use the expressions in The HAND Book.

Now, if they want to try to get the jury to lower the damages by saying, well, we only -- this is all we took, and you can tell already Mr. Sutton is prepared to do that. He said there are 16,975 words, and this only involved 32 or whatever figures he used.

And so, we shouldn't have to pay the full price for that. Then that's fine, and it's up to the judgment of the jury to decide, well, all of what Mr. Sutton said makes sense. It's -- 7.95 was the price for the whole book and maybe they shouldn't have to pay for the whole book, but good gracious, I mean, we should be entitled to try our case and let the jury decide based on the best available evidence.

The fact that there is no market for a page torn out of a book does not mean, as the Second Circuit said so eloquently, so they can steal with impunity. The law just simply won't allow that.

I would urge the Court to let us try our case, let us submit our damage theory. It's always been the same. It's always been how many copies did they make and what was the fee we were entitled to exact on a per copy basis. Just let us try our case and submit it on that way.

If you still disagree that, oh, no, that's just an improper measure of damages, then you could certainly take care of it on our motion post trial; and we'll go up. I don't want to have to try this case twice.

I don't want to take your time for -- well, with all of these exhibits, it would be two or three or four weeks trying this case. Only then to -- I have an appellate issue obviously on the -- a judgment. Let me try my actual damages claim.

Mr. Sutton has other issues, I imagine, that he would take issue of the Court. Just let us try our case, put it on, let him make all of his arguments about that to the jury.

Maybe they'll take care of it and there will be no problem. But to just say to us on the eve of trial, no, I'm not going to let you -- even though you pled actual damages, even though you have a theory, even though this is a case that says the law will support a per unlawful copy basis, the fee you're entitled to charge per unlawful copy basis. I'm not going to let you do that. I really would submit, in all earnestness, that that would fault your judicial economy. That would be ungrossly (sic) unfair to my clients.

THE COURT: All right. Mr. Sutton?

MR. SUTTON: Your Honor, you got it exactly right. There is no evidence. There is no evidence. And they could have cured this long ago by having an expert and have an expert come in here and testify about fair market value, but they didn't do that.

The time came, passed. They didn't designate an expert. They didn't give us an expert report. They didn't do anything.

They clung to this one bogus theory that they could be greedy, and they could take what our distributions were and try to hammer us over the head for hundreds of millions of dollars.

That's their only evidence. You're absolutely right there was never any discussions that Compaq was going

to come close to any kind of deal like that, that it was only, as you properly differentiated between, selling the actual product and a license.

And it gets back to the Davis versus The Gap case, you absolutely analyzed it right. I mean, they said there that, here, the plaintiff there was trying to take the number, two and a half million and multiply it by times one dollar and get to two and a half million dollars.

Even two and a half million dollars was considered to be wildly inflated, two and a half million. And here they're saying 800 million. That's -- I don't know how to characterize that.

But the court there looked at the evidence in the record, you're right, the evidence in the record; and it was one license for $50.

So, I submit that your conclusion is absolutely correct; and it will stand up on appeal.

MR. VICKERY: Let me just respond to two things, Judge. First of all about the experts. Okay. I don't know about you, but I think we've gotten experted to death in the practice of law.

In the time we've seen it, what kind of expert can come in and say, I'm an expert on what the value of one page torn out of a book is?

THE COURT: Well, but that's not the issue here,

Mr. Vickery. Come on. That's not what we're talking about.

MR. VICKERY: But it -- but it is, Your Honor. It -- I mean, what he says, what Mr. Sutton says is they could cure it with an expert.

We only are charged with copying a little bit, and he suggests that there is someone who has the expertise to say what that would be worth.

Well, what the Second Circuit said a few weeks ago that from an actual damages standpoint under the law, it is worth what fee we are entitled to charge for it. What the Supreme Court said in Harper and Rowe, discussing it in the fair use context, was that it is not a fair use if someone, for commercial purposes, copies to avoid paying the customary price.

And so, to say -- to say that a court of law would sanction a company coming in and say, we made 46 million copies, but by God we never intended to pay a dime for them. We didn't intend to do a deal with these people. We had no intention to negotiate with them or pay anything for them. So, got you. We're not liable for actual damages. We're only liable for 100, 150,000, maybe 300,000 per infringement is absolutely counter to the theory of the law.

So, we don't need an expert. Now, you know, if I'd been in the case then and I saw an expert

designation, I certainly would have thought about it. I got in the case after that designation time came and went, but I don't know that necessarily as I stand here today to say that there is somebody that I could have gotten. I suspect if I had somebody that came in and said, well, Judge Harmon, there have been no sales of page 14 of the harm -- HAND Book, but I am an expert on what a reasonable value for that would be. I expect if I came up with such a person, we would have had a ^ Dalbert challenge.

THE COURT: I'm sure you would have.

MR. VICKERY: Okay.

THE COURT: But I'm not agreeing with it.

MR. VICKERY: Okay. Well, you may not have --

THE COURT: It depends on what the expert said. I mean, I could imagine that there would be some people who would come up and say, well, you know, given the comparisons or this and that and the other thing, here is my chart. I've got the numbers. I'm a Ph.D.

And, you know, it would fly; but having somebody say, well, it's X computers times 7.95, what's that?

MR. VICKERY: Courts do that all the time. I mean, that's the whole -- they do it in the related patent context. I know that you've tried patent cases, and that statute -- look at the just position on them.

The patent statute, unlike the copyright statute, it sort of defines two statutory measures of damages. It defines one as lost profits and that's the higher measure, but it says as at a minimum a reasonable royalty.

And the way that's determine is, in this sort of hypothetical negotiation, between a willing buyer and a willing seller; and you have the jury in the box and there was no willing buyer. There was no willing seller, but you put on evidence about the custom in the industry or whatever.

THE COURT: I think what this On-Davis case says is, if you can't show us profits, what you can show is what a willing buyer would buy it for. In other words, they are bringing in patent stuff and sticking it in this copyright situation; but you still got to have a customary charge.

You got to have what is the fair market value? What is the customary charge? What is the number?

And you can't do that by just saying, well, I could set sell the book for 7.95, or I wanted to sell the book for 7.95. I offered to sell it to them for 7.95. It's just not enough.

MR. VICKERY: But it's all you've got. It's all the law is relegated to. We can't make up facts. We can't say, oh, there was a market out there for, you know, this or

that or the other and conjure up facts, get some expert to sort of ex post facto, come up with the facts. We get -- you know, we get these cards as they're dealt to us.

Here are the facts. The fact is there is a book. The fact is that they took portions of it because they didn't want to pay what the Supreme Court says is the customary price. The fact is they took it because they didn't want to pay what the Second Circuit says we had a legal right to charge them for.

The fact is they chose to only copy portions of it, a fact which they can bring out in asking the jury to reduce the damages and say, don't make us pay for the whole book. We didn't copy the whole book.

But it's of necessity unless the law is just going to say, well, you know, if you're a big company and you swear you weren't going to pay anything for it anyway and you make enough copies, 46 million copies so that it sounds like a big number, I mean, heck, that's not our fault. So, they made 46 million copies. Then you can come into a court of law and you can -- as the Second Circuit said, you escape with virtual impunity.

I just -- I mean, I simply can't blame -- we've gone all this trouble to have this case ready for trial.

THE COURT: I know. I know. I know.

MR. VICKERY: And it makes no sense for us to take two, three weeks of your time, whatever it would take.

THE COURT: I thought you said it would take three days.

MR. VICKERY: Oh, I did, too, until the Court allowed 58 pictures of hands on keyboards. I mean, with all due respect, Judge, if we are going to have to deal with evidence which really should have been excluded on the basis of your order, it's going to take longer to try; and I don't want to try this case twice. There is -- there is no harm in letting us try our case.

If, you know -- in the cool reflection of a little more time of hearing the evidence, if you feel the same way after you've heard all the evidence, you can take care of that.

You can do a JOL. We don't even have to retry the case; but if you do this, then we spend a lot of time trying the case where our only available measure is a statutory damages measure which is just grossly inadequate. That's not what all this stuff was prepared for. Please let us do it.

THE COURT: You are so eloquent, but I just can't. I have to have some integrity here. I can't just -- let's just have a run-through. I mean, I just can't do that. That's -- I firmly believe this is what the law is,

Mr. Vickery. If I'm wrong, sobeit, (sic) I'm wrong.

MR. WALDNER: Your Honor, I apologize. And I hate to double team Mr. Sutton.

THE COURT: Well, what's your name?

MR. WALDNER: My name is Paul Waldner for the record. I'm cocounsel with Arnold Vickery.

THE COURT: All right.

MR. WALDNER: I've been sitting here about ready to explode the last couple of days because I haven't gotten to talk. I'm going to limit my remarks to one minute.

THE COURT: All right.

MR. WALDNER: There is a customary price that has been established, 10,000 copies of The HAND Book were sold, 10,000 copies. What has been established through those sales is that the customary price is $13.25. That's the price of The HAND Book through 10,000 sales that were made. And if you take the rationale and the discussion in On-Davis with regard to what a victim of an infringement is entitled to, that customary price established by that number of sales fits very well into the On-Davis rationale and discussion.

And so, it's not like we have a situation where Stephanie Brown and her husband got together and authored and then produced a book and then they went to Compaq and said, look, you got all of these RSI litigation problems.

How about this? We copyright. That's not the situation. They sold to banks. They sold to insurance companies. They sold to other computer manufacturers. There was a market out there that culminated in 10,000 sales of this book with a customary price of $13.25.

Now, we wish there were a bigger market because then we would have better evidence to argue to the jury;

but there is evidence to argue to the jury with regard to the customary price of The HAND Book.

And with that, I'll sit down; and thank you very much.

THE COURT: You're very welcome.

MR. VICKERY: I can't add anymore than that, Your Honor. Just the fact that there is a customary price for the copyrighted work, and there is a -- they got a better deal than the customary price that was offered to them. They elected to copy instead of paying the customary price. Under the law we think we're entitled to prove what we are entitled to charge for on a per copy basis.

THE COURT: Mr. Sutton, you want to say anything; or you're happy?

MR. SUTTON: I'm happy.

THE COURT: Okay. Well, I --

MR. SUTTON: I'll just make one comment, Your Honor.

THE COURT: Sure.

MR. SUTTON: There is not an established customary price for a license in millions of copies, and there is no customary price with respect to this small portion that you picked up properly on as well. There is just no customary price for that.

And then so, their position has always been wildly inflated; and the ruling is great.

THE COURT: All right. My ruling stands. I'm not going to -- just don't see any evidence of it. Statutory damages is going to be it.

So, I'm sorry about that. I really am; but I just -- that's what I think. I think that's the law.

So, I'll see you-all Monday morning.

(Proceedings recessed.)

CERTIFICATE

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

7/10/2001 /s/ Anne Trayler
Anne Traylor, CSR, RPR

APPENDIX N

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

United States Courts
Southern District Of Texas
FILED
JUL 27 2001
Michael N. Milby, Clerk

COMPAQ COMPUTER CORPORATION,

Plaintiff,

CIVIL ACTION NO. H-97-1026
JUDGE: MELINDA HARMON
JURY TRIAL DEMANDED

vs.

ERGONOME INCORPORATED,
STEPHANIE L. BROWN, AND THOMAS
MOWREY,

Defendants.

ERGONOME INCORPORATED and
STEPHANIE L. BROWN,

CIVIL ACTION NO. H-98-3159
Plaintiffs, JUDGE: MELINDA HARMON
JURY TRIAL DEMANDED

vs.

COMPAQ COMPUTER CORPORATION,

Defendant.

ERGONOME INCORPORATED'S MOTION TO DISREGARD FINDINGS 5 & 6 AND ENTER JUDGMENT AS A MATTER OF LAW, AND MOTION FOR NEW TRIAL

The Court signed a Final Judgment on July 13. 2001, which was entered by the Clerk on July 16, 2001. This Motion is being filed within the period permitted for filing motions for new trial. A separate Motion to Alter or Amend was filed on behalf of the Defendants Brown and Mowrey.

There is an error in the Court's Judgment which declares that the Compaq Guides at issue "DO NOT INFRINGE". Actually, in response to Special Interrogatories Numbers 1-4, the jury found that they do, and the Final Judgment should be modified or amended to reflect these findings. The questions of law presented by the verdict, and highlighted in this motion, are simply whether either finding 5 or 6 will support a judgment in Compaq's favor. For the following reasons, they do not.

Ergonome Incorporated moves the Court to disregard the jury's findings in response to Special Interrogatories Numbers 5 (de minimis) and 6 (fair use), and to enter Judgment in the Declaratory Judgment action in its favor. In the alternative, Ergonome moves the Court for a new trial on one or both of these issues, as set forth below. Finally, regardless of the Court's ruling on this Motion, Ergonome moves the Court for a new trial on its claim for those damages permitted by 17 U.S.C. §504(b), i.e. "actual damages" of the copyright owner, and "infringer's profits". The reasons for this Motion are set forth below:

I. BECAUSE *DE MINIMIS* IS NOT AN AFFIRMATIVE DEFENSE, THE ANSWER TO QUESTION 5 IS A LEGAL NULLITY WHICH WILL NOT SUPPORT A JUDGMENT IN COMPAQ'S FAVOR, AND WHICH, IS ARGUABLY IN CONFLICT WITH THE ANSWERS TO QUESTIONS 2 AND 4.

The rights of copyright owners are defined by statute. 17 U.S.C. §106. Accordingly, the remedies for violations of those rights are also congressionally mandated by **statute.** 17 U.S.C. §501. Limitations on those rights, and, correlatively, **affirmative defenses** to the statutory cause of action, must, perforce, also be defined by **statute**. As noted in section II below, "fair use" is such a limitation and affirmative defense. 17 U.S.C. §107. "De minimis" is NOT.

Several factors demonstrate this beyond question. First, the Copyright Act itself makes no mention whatsoever of "de minimis". Second, no case can be found among the reported jurisprudence collected in Westlaw's "ALLFEDS" database in which "de minimis" is described as an affirmative defense[16]. A search for the terms "de minimis" and "affirmative defense" in the same paragraph yielded a list of five cases, none of which were on point, and none of which hold that de minimis is an affirmative defense to copyright infringement. The most extensive discussion of the concept of "de minimis" as any type of defense or limitation to federal **statutory** claims was found in a Special Master's Opinion, published as Appendix B to the case of **United States v. Conservation Chemical Co.** , 619 F.Supp. 162 (W.D.Mo. 1985).[17] In that case, the Special Master and court rejected a de minimis argument on behalf of relatively minor polluters.

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[16] The Eleventh Circuit recently described it as defensive in nature, but it is clear from its discussion that this "defense" was in the context of correctly analyzing the mutually exclusive, reciprocal nature of "de minimis copying" and "actionable copying". **See Greenberg v. National Geographic Society** , 244 F.3d 1267, 1275 (11th Cir. 2001).

[17] In a lengthy string cite of cases in which a de minimis "defense" had been interposed to a federal statutory cause of action, that court cited **Rexnord, Inc. v. Modern Handling Systems, Inc.** , 379 F.Supp. 1190, 1194 (D.Del. 1974). Review of the case illustrates, however, that that court was using

So, if de minimis is not an affirmative defense, what is it? The lead case on point is **Ringgold v. Black Entertainment Television, Inc.** , 126 F.3d 70 (2nd Cir. 1997) which identifies three different ways in which the phrase "de minimis" has been used in copyright law. The first is in the traditional context of *de minimis non curat lex*, i.e. as something so minimal and trivial as to not be legally cognizable.

Second, "de minimis can mean that copying has occurred to such a trivial extent as to fall below the quantitative threshold of substantial similarity, which is always a required element of actionable copying." **Compaq Computer Corp. v. Ergonome Inc.** , 137 F.Supp.2nd 768, 778 (S.D.Tex. March 27, 2001), quoting *Ringgold*. "In this case, **Compaq invokes** the second aspect of the de minimis doctrine and argues that the 1994, 1995, and 1997 versions of its Guide do not cross the 'substantial similarity' threshold for actionable copying." *Id.*

The Court was, of course, correct in viewing "de minimis" in this context. Viewed as such, the question of "de minimis" is clearly **not** an affirmative defense and the submission of a special interrogatory inquiring about the "de minimis" affirmative defense is inappropriate. Rather, it is more in the nature of an inferential rebuttal instruction. The Court's view in this regard is consistent with the manner in which other courts, post-*Ringgold*, have handled the issue. *See e.g.* **Greenberg v. National Geographic Society** , 244 F.3d 1267, 1275 (11th Cir. 2001)("Thus, the use of the Sequence in the context of the entire CNG is not a de minimis use that fails to reach the threshold of actionable copyright infringement."); **SGC Communication Resources, LLC**

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the doctrine in the same manner as this Court, i.e. as the reciprocal of "substantial similarity".

v. The Seminar Center, Inc. , 2001 WL 274053 (S.D.N.Y. 2001)("Notwithstanding proof that copying occurred, copying that is so trivial as to fall below the quantitative and qualitative threshold of substantial similarity will be considered de minimis and, thus. not actionable.)

Consistent with this view, on March 27th this Court concluded the following about the applicability of "de minimis" to this case:

> As a result, the de minimis question becomes, then, "whether copying has occurred to such a trivial extent as to fall below the quantitative threshold of substantial similarity, which is always a required element of actionable copying." *Ringgold*, 126 F.3d at 74 (citation omitted).

Compaq Computer Corp. v. Ergonome Inc. , 137 F.Supp.2nd 768, 779 (S.D.Tex. March 27, 2001).

At Compaq's insistence, separate special interrogatories, about "substantial similarity" (used in this context as the functional equivalent of "actionable copying") numbers 2 and 4 were included in the Special Verdict form. The jury's "Yes" answers to those questions defeats "de minimis". Unfortunately, however, the Court also submitted a separate question, i.e. special interrogatory number 5, on "de minimis", as if it were a separate defensive issue, which it is not. IF the jury's consideration of this issue had been confined to a proper understanding of the de minimis concept, then its answer to question number 5 would be in irreconcilable conflict with its answer to questions 2 and 4, and a new trial would be required.

However, the closing arguments of Compaq's counsel indicate that, instead of using "de minimis" as the opposite of "substantial similarity", Mr. Sutton wielded this evidence and this concept in an inappropriate manner, i.e. to suggest "that the portion used was minimal and the use was so brief and indistinct as to tip the third fair use factor decisively against the plaintiff." Compaq Computer Corp. v. Ergonome Inc. . 137 F.Supp.2nd 768, 778 (S.D.Tex. March 27, 2001) quoting *Ringgold*. This use of the de minimis concept is inappropriate, as *Ringgold* itself squarely holds:

> Though the concept of de minimis is useful in insulating trivial types of copying from liability (the photocopied cartoon on the refrigerator) and in marking the quantitative threshold for actionable copying, *see, e.g., Vault Corp. v. Quaid Software, Ltd.*, 847 F.2d 255, 267 (5th Cir.1988) (30 characters out of 50 pages of source code held de minimis), **the concept is an inappropriate one to be enlisted in fair use analysis**.

126 F.3rd at 75-76 (emphasis added).

Finally, Ergonome's ability to respond to the "de minimis" allegations was compromised by the exclusion of important evidence concerning the "qualitative" component. The subtitle of The HAND Book is "Preventing Computer Injury." As Ms. Brown's testimony established, the two wrist positions known to be most hazardous to computer users are ulnar deviation and wrist dorsiflexion. The first two chapters of the book are concerned with ulnar deviation, and the third is concerned with wrist dorsiflexion. There are four illustrations copied: two concerning ulnar deviation, and two concerning wrist dorsiflexion.

Compaq's need to update its 1991 Guide with safety information and warning stickers concerning repetitive stress injuries was directly linked to litigation concerning such injuries threatened against Compaq. Because the Court kept out all evidence concerning repetitive stress injury litigation, as well as repetitive stress injuries themselves, the jury had no information on which to base a proper qualitative measure of de minimis. If this evidence had been admitted the jury would have been able to assess the purpose of the use, as well as the clear fact that the illustrations copied were qualitatively the most important ones in The HAND Book, as evidenced by the fact that they concern the most dangerous positions, by the fact that discussion of those two positions occupies the first three chapters of The HAND Book, and, of course, by the fact that Compaq solicited a price quote and then chose to simply steal what it wanted from The HAND Book.

While excluding Ergonome's evidence designed to show the qualitative importance of the purloined expressions, the Court simultaneously put a "thumb on the scales of justice" by admitting expert testimony on the ultimate issue phrased as "de minimis". This is contrary to the law, as expressed by this Court in both its March 27th order[18] and in the charge, i.e. that the jury should decide questions of the substantiality of similarity "without any aid or suggestion or critical analysis by others".

Moreover, the Court's instruction regarding "de minimis" stated that the qualitative analysis should be done "taking into consideration prior similar expressions". This instruction directly contradicts the Court's March 27th opinion regarding originality and the Supreme Court's definition of same in **Feist Publications, Inc. v. Rural Telephone Service Co., Inc.** , 499 U.S. 340, 345-46(1991).[19]

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[18] The March 27th Order was, of course, the "law of the case" which could not be willy nilly ignored to the detriment of a party like Ergonome who relied on it. **United States v. Uccio** , 940 F.2d 753 (2nd Cir. 1991).

[19] "Original, as the term is used in copyright, means only that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity. To be sure, the requisite level of creativity is extremely low; even a slight amount will suffice. The vast majority of works make the grade quite easily, as they possess some creative spark, "no matter how

This error was compounded by the Court's refusal to instruct the jury, as requested by Ergonome, that the Court had concluded as a matter of law that the expressions in issue from The HAND Book are original and "creative" within the meaning of the copyright laws.

Thus, at the end of the day the submission of question number 5 was superfluous and the concept was misused by Compaq in arguments, in effect, to get a second bite at the "fair use" apple. Because the "de minimis" finding is negated by the finding of "substantial similarity", because it will not support a judgment in Compaq's favor, and because Compaq misused the doctrine in a manner which *Ringgold* condemns, the Court should disregard the finding to question number 5 and enter Judgment in Ergonome's favor on infringement. Alternatively, of course, the Court could declare the findings in response to questions 2 and 4 to be in conflict with question 5 and, because of that conflict and/or because pertinent evidence concerning the qualitative importance of the copied material was excluded and impertinent expert opinion testimony on this issue was admitted, order a new trial.

II. ALTHOUGH "FAIR USE" IS AN AFFIRMATIVE DEFENSE, THE EVIDENCE WILL NOT SUPPORT COMPAQ'S CLAIM TO THAT DEFENSE, AND THE UNDISPUTED FACTS AND EXCLUDED EVIDENCE NEGATE IT AS A MATTER OF LAW.

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crude, humble or obvious" it might be. Originality does not signify novelty; a work may be original even though it closely resembles other works so long as the similarity is fortuitous, not the result of copying. To illustrate, *346 assume that two poets, each ignorant of the other, compose **1288 identical poems. Neither work is novel, yet both are original and, hence, copyrightable."

Fair use is, of course, an affirmative defense to copyright infringement. The four elements which must be proven are codified in 17 U.S.C. §107 as follows:

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

(2) the nature of the copyrighted work;

(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

(4) the effect of the use upon the potential market for or value of the copyrighted work.

Compaq put on no evidence whatsoever about the first factor. None. It did not because (a) its use was decidedly commercial in character, and (b) the Court ruled that, in order to exclude evidence from Ergonome about the true commercial motivation for Compaq to copy, i.e. litigation avoidance, that Compaq would be precluded from adducing evidence about laudatory motives. That, of course, did not stop Compaq's counsel from simply arguing, from the structure and content of the Guides alone, that they were intended as instructional, and as a courtesy to customers. This attempt to trivialize or "minimize" the importance of these expressions obviously succeeded with the jury.

But the undisputed evidence known to the Court demonstrates the decidedly commercial nature of the use, which, as the Supreme Court has held, renders it **presumptively** unfair:

> "[E]very commercial use of copyrighted material is **presumptively an unfair exploitation** of the monopoly privilege that belongs to the owner of the copyright. *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S., at 451, 104

> S.Ct., at 793. In arguing that the purpose of news reporting is not purely commercial, The Nation misses the point entirely. The crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material **without paying the customary price.**"

Harper & Row Publishers, Inc. v. Nation Enterprises , 471 U.S. 539, 562 (1985).(emphasis added).

Doug James testified in his deposition that the Guides were promulgated in 1994 to avoid RSI litigation. Cynthia Purvis made begrudging concessions of a similar vein. And Compaq's RSI litigation counsel, Don McFall testified via deposition concerning the fact that Compaq was embroiled in its first trial at the time it ordered The HAND Book, and explained the importance of adequate warnings and instructions to defend products liability claims of this nature. Unfortunately, the Court excluded this and similar evidence.

The Court also refused to instruct the jury that the crux of the profit/nonprofit distinction is "whether the user stands to profit from exploitation . . . without paying the customary price" and to instruct them that "fair use presupposes 'good faith' and 'fair dealing.' " This was true even though the Court's own March 27th opinion contains these very quotes from **Harper & Row** and even though such instructions were requested by Ergonome. The Court did, however, instruct the jury beyond the four statutory factors in a manner which played into Compaq's "fair use" arguments. For example, it incorrectly instructed the jury with respect to substantial similarity that the works should be compared, *inter alia* "in their entirety" and that copyright protection might be "thin". These instructions bolstered Compaq's overall arguments about "de minimis" and "fair use".

Moreover, the Court excluded evidence about Compaq's negotiations with Ergonome about a "customary", or even "sub-customary" price, because that would have enabled Ergonome to claim damages. The evidence was excluded even on subsequent limited proffers focusing and limiting its use to the "fair use" defense.

This same excluded evidence bears on the fourth statutory factor, because Compaq was a key market for The HAND Book, and because its misappropriation of portions of The HAND Book obviously diminished the likelihood that Compaq would take a license for The HAND Book or for the derivative work, KeyMoves.

The Supreme Court has indicated that this fourth factor is the single most important factor. In **Harper & Row Publishers, Inc. v. Nation Enterprises** , 471 U.S. 539 (1985) Justice O'Connor wrote that

> to negate fair use one need only show that if the challenged use "should become widespread, it would adversely affect the potential market for the copyrighted work." *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S., at 451, 104 S.Ct., at 793 (emphasis added); id., at 484, and n. 36, 104 S.Ct., at 810, and n. 36 (collecting cases) (dissenting opinion). This inquiry must take account not only of harm to the original but also of harm to the market for derivative works.

Id. at 566-67. Subsequent writing courts have elaborated, pointing out that the focus of this inquiry is not only on the overall market for the copyrighted work, but also unique "niches" or segments of the market for that work, as well as the potential market for derivative works. *See e.g.* **Twin Peaks Productions, Inc. v. Publications International, Ltd.**, 996 F.2d 1366 (2nd Cir. 1993)("In the cases where we have found the fourth factor to favor a defendant, the defendant's work filled a market niche that the plaintiff simply had no interest in occupying.").

One distinct market niche for The HAND Book and its derivative, KeyMoves, was as an inclusion with Compaq computers. Ergonome certainly had an interest in occupying that market niche. Cynthia Purvis solicited a price quote for that market, but then decided that, rather than pay $7.95/copy for the real thing, she would simply plagiarize those parts that Compaq wanted. Compaq's 1994 and 1995 Guides entirely supplanted that market. Compaq placed over 32,000,000 copies of the infringing Guides in all of its computers for a three year period.

If Ergonome bore the burden of defense on fair use, the exclusion of evidence negating it, the absence of evidence supporting it, and the failure to charge might necessitate a new trial. However, because this is an affirmative defense, and because the undisputed facts defeat the defense as a matter of law, the Court should disregard the finding to question number 6 and enter judgment as a matter of law in Ergonome's favor on the liability aspects of this case.

III. THE COURT MUST DECLARE A NEW TRIAL ON THE ISSUE OF SECTION 504(b) DAMAGES.

The twin measures of damages, actual damages for the copyright owner plus a portion of the infringer's profits, is mandated by statute. 17 U.S.C. §504(b). The most recent and comprehensive authority construing and applying this statute, **On Davis v. The Gap, Inc.** , 246 F.3d 152 (2d Cir. 2001), suggests that proof consisting of the price that the owner was "entitled to charge" on a per unauthorized copy basis consists of legally adequate proof of such damages. And, as the Second Circuit pointed out in that case, this jurisprudence regarding damages proof dovetails nicely with the Supreme Court's teachings in **Harper & Row** , *supra*, concerning avoidance of the "customary price".

Ergonome marshaled ample evidence to warrant the submission of such damages to the jury. It proved that Compaq solicited a price quote to bundle The HAND Book with Compaq computers. It proved that Ergonome rejected the notion of a piecemeal license. It also proved the customary retail price of $19.95/copy, and the good faith discount price of $7.95 which was offered to Compaq.

Ergonome was also prepared to prove that the average selling price for The HAND Book was $13.95/copy. Ergonome was also prepared to prove that many copies of The HAND Book were provided to substantial commercial customers in the context of KeyMoves licenses. And, finally, it was prepared to prove that Compaq made over 32,000,000 unlawful and unauthorized copies. All of this evidence was erroneously excluded by the Court.

The jury has now found both actual and "actionable" copying took place. And, for the reasons set forth above, neither the "de minimis" finding (question #5) nor the "fair use" finding (question #6) constitute valid defenses to such infringement. Accordingly, when the Court grants JMOL on those issues, it should then order a new trial limited solely to the question of damages.

IV. OTHER MISCELLANEOUS ERRONEOUS RULINGS WARRANT A NEW TRIAL

For the reasons set forth above, Ergonome submits that the Court should grant judgment as a matter of law with regard to the "de minimis" issue and the fair use defense, and order a new trial on damages. However, if the Court is not inclined to do that, a new trial is warranted on one or more of these issues for the following reasons.

1. Excluded evidence of Compaq's motive for copying portions of The HAND Book. As noted above, the first statutory element for a fair use defense is the purpose and character of the use. There is no dispute about the fact that Compaq's 1994 Guide was hastily prepared, while Compaq was engaged in its first RSI

trial, **in part**, to defend or thwart off other RSI claims. Counsel and the Court are well aware of that. Unfortunately, the jury was not. By limine ruling prior to trial the Court excluded this evidence which would be pertinent to that issue, and to the "qualitative" component of the "de minimis" issue. Although, under the 2000 amendments to Rule 103(a), Fed.R.Ev., no contemporaneous objection or proffer is required, Ergonome did bring the matter to the Court's attention during the trial, offering proof about the RSI motives from Doug James, Cynthia Purvis, and Don McFall. If the Court had not granted the limine order, other Compaq witnesses would have been queried about this motivation as well.

In addition to the litigation avoidance animus, Ergonome also offered evidence about the "marketing" benefits to Compaq from having the Safety and Comfort Guide in its packaging. The Court would not even allow evidence of this motivation and benefit.

Thus, it is not surprising that the jury found the use, that seems at first blush to be plain vanilla, to be "fair".

2. Excluded evidence of Ms. Purvis's copyright infringement tutorial. This evidence negates fair use and innocent infringement, and constitutes probative proof of a willful infringement. It also constitutes important impeachment evidence concerning Compaq's most critical witness.

3. Erroneously admitted evidence regarding commonality of words and illustrations and testimony tending to minimize or trivialize the importance of correct hand and arm placement. Compaq was allowed, over Ergonome's repeated objections, to portray the 1994 Guide as a simple, ho-hum instructional manual, included for customer convenience and little more. Despite the fact that the Court held decisively on March 27th that The HAND Book was copyrightable, and, in particular, that the expressions in issue in this case fell within the ambit of such legal protection, Compaq was allowed over repeated objections to introduce evidence

regarding the commonality of words such as "natural" and "angled", ignoring the fact that they were used in this case in the context of protected phrases.

Compaq was also allowed to portray the illustrations in dispute as common, as if they were not protected by copyrights. And nothing was said by the Court in jury instructions regarding the "selection and arrangement" law that the Court discussed so effectively in its March 27th Order.

Moreover, despite the fact that the March 27th Order stated that "no plagiarist can excuse" misconduct by showing how much of his own work was not pirated, or how much of the copyrighted work was not taken, the Court allowed numerous Compaq witnesses and Compaq's counsel to paint a picture that this copying was "no big deal".

The error was compounded by the Court's failure to give the jury any limiting instruction regarding the use of this evidence, or, indeed, to even tell the jury in any meaningful way about the issues that the Court had resolved.

4. The Court erred in granting summary judgment on Ergonome's fraud allegations. The argument and authorities in support of this contention are contained in the parties' prior briefing before the Court.

5. Comments by the Court. The Court interjected herself into the credibility issues which the jury must decide in several respects, e.g. commenting and instructing the jury regarding Ms. Brown's testimony about perceived threats to her family and deriding Mr. Waldner in front of the jury about his voir dire examination of Compaq's improperly admitted expert. The comments concerning Ms. Brown's feelings or fears about threats become particularly harmful to Ergonome when they are juxtaposed with the extensive testimony which the Court permitted Ms. Purvis to give about how she felt "threatened" by Mr. Mowrey's letter of December 10, 1996.

6. Errors regarding the Charge. The argument and authorities in support of this contention are contained in Ergonome's requested instructions and the briefing and arguments regarding same.

7. Jurisdictional issues. The Court erred in holding specific personal jurisdiction over Ergonome, particularly in light of the evidence developed at trial which shows that the acts of infringement, as found by the jury, were completed during the month of February 1994, before Ergonome had any direct contact with Compaq in Texas.

8. Venue/abstention issues. The Court also erred by failing to dismiss Case No. H97-1026 as an anticipatory, forum-shopping abuse of the Declaratory Judgment Act and by failing to address and balance the so-called *Rowan* factors viz. a viz. declaratory judgment abstention. The Court also erred in disregarding its own comments made at the hearing on October 2, 1998 and in consolidating the two cases for trial.

9. Discovery issues. The Court also erred in failing to compel discovery on various pertinent matters, including RSI litigation and Compaq's gross revenues and appropriate deduction from same for section 504(b) "infringer's profits" purposes.

10. Other problems with the Court's Charge. The Court's charge to the jury was incorrect in a number of material ways. Among the material errors that may have led to the jury's incorrect and contradictory finding were the following. First, as discussed in detail above, the Court incorrectly instructed the jury as to the elements of fair use. The Court failed to give guidance regarding the commercial character of the use and the need for good faith and fair dealing in the context of use such as Compaq's, and the effect of that use on the market for The HAND Book. Second, the Court's de minimis charge improperly instructed the jury to consider "prior similar expressions" in considering whether Compaq's taking was de minimis. This concept of "novelty" is common in the patent law, but is totally foreign to the copy-

right law. The Court, having already found that the expression at issue was sufficiently original to gain copyright protection, should not have instructed the jury to consider novelty in its de minimis deliberation. Compaq's attorneys returned to this erroneous concept again and again during the trial spending literally hundreds of transcript pages on it, and this error alone may well have fatally flawed the jury's de minimis finding. Third, the Court's charge on substantial similarity incorrectly set out standards for the jury's consideration of The HAND Book as if it were a computer program or factual compilation, which it is not. Thus, the charge erroneously introduced to the jury the concept of considering the entire work, as opposed to the infringed portion, and of "thin" copyright protection and "virtually identical copying", both of which inappropriately and erroneously raise the bar for infringement beyond the standard applicable to The HAND Book. This language from the Court undoubtedly poisoned the jury's deliberations on de minimis and caused the jury inappropriately to apply this standard to its analysis: no other explanation exists for the apparently contradictory jury findings on substantial similarity and de minimis. Fourth, and perhaps most importantly, the Court failed to charge the jury on willfulness and damages robbing Compaq's copying of any commercial context and taking from the jurors the tools they needed to determine both the character of Compaq's use and the importance of the portions taken. These factors were vital to the jury's determinations of fair use and de minimis and the Court's charge therefore prevented the jury from reaching a decision on the properly applicable law.

11. Errors regarding expert testimony. The Court erred in denying Ergonome's motion in limine to exclude Compaq's experts and then erroneously limited their cross-examination.

Conclusion.

For the foregoing reasons, Ergonome urges the Court to grant JMOL as to liability, and to order a new trial on damages. Alternatively, Ergonome urges the Court to grant a new trial on de minimis, fair use, and/or damages.

Respectfully submitted,
VICKERY & WALDNER, LLP
/s/ Andy Vickery

Andy Vickery
Texas Bar No. 20571800
Paul F. Waldner
Texas State Bar No. 20679800
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30 Broad Street, 36th Floor
New York, New York 10004
(212) 943-9000
(212) 943-4325 Fax

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing pleading has been served upon counsel for Compaq, Michael Sutton and Matt Reeves, via mail on the 27th day of July, 2001:

/s/ Vickery

APPENDIX O

CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
FILED
JAN 29 2001
Michael N. Milby, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

COMPAQ COMPUTER
CORPORATION

CIVIL ACTION NO. H-97-1026

vs.

JUDGE: MELINDA HARMON

ERGONOME INCORPORATED,
STEPHANIE L. BROWN, and
THOMAS MOWREY

AFFIDAVIT OF ANDY VICKERY

THE STATE OF TEXAS §
§
COUNTY OF HARRIS §

Andy Vickery, duly sworn upon oath, states:

I am a lead counsel for Ergonome Incorporated, Stephanie L. Brown and Thomas Mowrey in the above captioned lawsuit.

The following are exhibits used in Ergonome Incorporated's Brief in Support of Supplemental Motion for Summary Judgment and said exhibits are true and correct copies:

(A.-F.) (omitted)
G. Deposition of Douglas James

(H.-O.) (omitted)

FURTHER AFFIANT SAYETH NOT.

/s/ Andy Vickery
ANDY VICKERY

SUBSCRIBED AND SWORN TO before me by the said Andy Vickery **on this** 29th day of January, 2001/

NOTARY PUBLIC, STATE OF TEXAS

(EXHIBIT G)

DOUGLAS JAMES Multi-Page™ 12-4-04
COMPAQ-v-ERGONOME

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

COMPAQ COMPUTER CORPORATION,

CIVIL ACTION
NO. H-97-1026

Plaintiff,

vs. JUDGE: MELINDA HARMON

ERGONOME INCORPORATED and
STEPHANIE L. BROWN

Defendants.

****

ORAL AND VIDEOTAPED DEPOSITION OF
DOUGLAS JAMES
DECEMBER 4, 2000

****

ORAL AND VIDEOTAPED DEPOSITION of DOUGLAS JAMES, produced as a witness at the instance of he Defendant, and duly sworn, was taken in the above-styled and numbered cause on December 4, 2000, from 10:29 a.m. to 12:08 p.m., before Shelly Dann, CSR, RPR, in and for the State of Texas, machine shorthand method, at the offices of Vickery & Waldner, L.L.P., 2929 Allen Parkway, Suite 2410, pursuant to the Federal Rules of Civil Procedure and the provisions as may be stated on the record or attached hereto.

APPEARANCES

COUNSEL FOR THE PLAINTIFF:

Rod Cooper
SIDLEY & AUSTIN
717 North Harwood
Dallas, Texas 75201
(214)981-3331

COUNSEL FOR THE DEFENDANTS:

Paul F. Waldner
VICKERY & WALDNER, L.L.P.
The America Tower
2929 Allen Parkway, Suite 2410
Houston, Texas 77019

ALSO PRESENT:

Rhonda Hawkins
Thomas Mowrey
Doug Albert (Videographer)

Page 4

THE VIDEOGRAPHER: We're on the record, Monday, December the 4th, 2000, at 10:29 a.m.

DOUGLAS JAMES,
having been first duly sworn, testified as follows.

EXAMINATION

BY MR. WALDNER:

Q. What is your name, please?

A. Douglas James.

...

Page 7

Q. Okay. Do you still work for Compaq?

A. Yes, I do.

Q. And what's your title or position?

A. Manager of E-Commerce.

...

Page 45

Q. All right. Were you aware in 1994 of any potential liability threats against your company for alleged repetitive stress injuries?

MR. COOPER: Objection, irrelevant.

Q. (By Mr. Waldner) You can answer.

A. Yes.

Q. You were aware of the fact that your company had multiple suits pending against it where people -- their customers had alleged that they injured their

Page 46

hands, wrists, or arms in using your keyboards? Are you aware of that?

MR. COOPER: Objection, irrelevant.

Q. (By Mr. Waldner) You can answer.

A. Not multiple, but yes, I was aware.

Q. Okay. You were aware of at least one?

A. Yes.

Q. Okay. Was it your understanding that the Safety and Comfort Guide was being put together, at least in part, to avoid Compaq's liability for such lawsuits?

MR. COOPER: Objection, irrelevant.

Q. (By Mr. Waldner) You can answer.

A. Yes.

...

APPENDIX P

Compaq 1994 Safety & Comfort Guide, Page 2 (Ergonome Trial Exhibit 2)

! WARNING

There may be a risk of **serious physical injuries** from working at your computer workstation. To minimize the risk of injury and to increase your comfort, follow the directions in this *Safety & Comfort Guide.*

Some studies have suggested that long periods of typing, improper workstation setup, incorrect work habits and/or problems in your personal health may be linked to injuries. These injuries could include carpal tunnel syndrome, tendinitis, and tenosynovitis.

The warning signs of these disorders include:

- Numbness
- Tingling
- Throbbing
- Burning
- Soreness
- Aching in the hands, wrists, arms, or neck.

Symptoms may be felt during typing or at other times when no work with the hands is being performed, including at night. If you experience these symptoms or any other pain or discomfort that you think may be related to using a computer, you should promptly consult a doctor. The following pages describe proper workstation setup, posture, and health and work habits for computer users. In addition, this guide contains product safety information applicable to all Compaq products.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
FILED
JUL 23 2001
Michael N. Milby, Clerk of Court

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

COMPAQ COMPUTER CORPORATION,	CIVIL ACTION NO. H-97-1026
Plaintiff,	Houston, Texas
vs.	6/29/2001 3:15 p.m.
ERGONOME, INC., STEPHANIE L. BROWN, and THOMAS MOWREY,	
Defendants.	

VOLUME II
PRETRIAL HEARING

BEFORE THE **HONORABLE JUDGE MELINDA HARMON**
UNITED STATES DISTRICT JUDGE

REPRESENTING

THE PLAINTIFF: MICHAEL O. SUTTON
MATTHEW REEVES
ROD COOPER

THE DEFENDANTS: ARNOLD ANDERSON VICKERY
PAUL F. WALDNER, III

Court Reporter: Anne Traylor, CSR, RPR
Official Court Reporter
515 Rusk, Room 8016
Houston, Texas 77002

PROCEEDINGS REPORTED BY MECHANICAL STENOGRAPHY
TRANSCRIPT PRODUCED BY COMPUTER-AIDED TRANSCRIPTION

(Page 2 omitted)

Page 3

...

MR. VICKERY: Ergonome offers its Exhibits 1 through 3 after which there is no objection.

MR. SUTTON: Correct, Your Honor.

THE COURT: 1 through 3 are admitted.

(Page 4-149 omitted)

CERTIFICATE

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

7/10/2001 /s/ Anne Trayler
Anne Traylor, CSR, RPR

APPENDIX Q, Part One:
Trial Testimony of Mary Kuna

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
FILED
APR -2 2003
Michael N. Milby, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

COMPAQ COMPUTER CORPORATION,

vs.
ERGONOME, INC.,
STEPHANIE L. BROWN, and
THOMAS MOWREY,

NO. CA-H-97-1026
HOUSTON, TEXAS
JULY 5, 2001
9:00 A.M.

Corrected
TRANSCRIPT OF TRIAL PROCEEDINGS
BEFORE THE HONORABLE MELINDA HARMON

VOLUME III

APPEARANCES:

FOR THE PLAINTIFF:
MICHAEL O. SUTTON
LOCKE, LIDDELL
600 TRAVIS, #3400
HOUSTON, TX 77002

FOR THE DEFENDANT:
ARNOLD A. VICKERY
PAUL WALDNER
VICKERY & WALDNER
2929 ALLEN PARKWAY
HOUSTON, TX 77019

(Pages 3-66 omitted)

WITNESS
MARY KUNA

Page 67

(JURY NOT PRESENT)
DIRECT EXAMINATION
BY MR. VICKERY:

Q. State your name?

A. My name is Mary Kuna.

...

Page 68

Q. Ms. Kuna, in 1994 you were employed by (Compaq) in a department where you had supervisory responsibility for certain people, right?

A. That's correct.

Q. What was that department?

A. The department was marketing communications and we called ourselves marketing services.

... (Pages 69-93 omitted)

Q. Ms. Kuna, in anticipation of this trial, have you gone through and attempted to reconstruct how many copies of the '94 Guide were done in printed medium and how many electronic, on a worldwide basis?

A. Yes. We broke it down several ways, one being worldwide numbers.

Q. Can you tell us just sort of the whole global thing. roughly how many copies are we talking about. including all different foreign languages. English and the electronic?

A. About 32 million roughly.

... (Pages 94-104 omitted)

I, JACKIE SMITH, CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE RECORD OF PROCEEDINGS IN THE ABOVE ENTITLED MATTER.

/S/ Jackie Smith 1/13/02 (sic)

JACKIE SMITH DATE

APPENDIX Q. Part Two:
Affidavit of Mary Kuna

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

COMPAQ COMPUTER	§	Civil Action No. H-97-1026
CORPORATION,	§	Civil Action No. H-98-3159
	§	and consolidated
Plaintiff.	§	
v.	§	
	§	
ERGONOME, INC.,	§	Jury Trial Demanded
STEPHANIE L. BROWN,	§	
and	§	Judge: Melinda Harmon
THOMAS MOWREY	§	
	§	
Defendants.	§	

SUPPLEMENTAL AFFIDAVIT REGARDING TESTIMONY OF MARY KUNA FOR DEFENDANT'S OFFER OF PROOF

1. My name is Mary Kuna and on July 5th, 2001, I testified in Judge Harmon's Court that Compaq shipped a 1994 version of their *Safety & Comfort Guide* with approximately 32 million products worldwide for the time period of the last week of December 1994 through October 1997 ("time period").

2. In this testimony, I agreed to provide a more accurate number of worldwide shipments for both the hard copy and online version of Compaq's *1994 Safety & Comfort Guide* for the time period. Additionally, I agreed to further breakdown the worldwide numbers for the hard copy and online versions into foreign and domestic numbers.

3. The hard copy version of Compaq's *1994 Safety & Comfort Guide* was shipped with approximately 21,134,269 Compaq products worldwide during the time period. Of these, 12,349,465 copies were shipped in the United Stated and 8,784, 804 copies were shipped outside of the United States.

4. The online version of Compaq's 1994 *Safety & Comfort Guide* shipped with 11,102,241 Compaq products on a worldwide basis during the time period. Of these, 4,949,997 were shipped within the United States and Canada while 6,152,244 were shipped in other countries. I was not able to find a number for the shipments of this online version in the United States without including Canada numbers because the only numbers I was able to locate for the United States are the total North American numbers, which include Canada.

5. Therefore, Compaq's 1994 *Safety & Comfort Guide* was provided in total with approximately 32,236,510 Compaq products worldwide with approximately 17,299,462 of those provided primarily in the United States, which includes the number of the online Compaq 1994 *Safety & Comfort Guide* that went to Canada. This leaves 14,937,048 provided outside of the United States other than those online *1994 Safety & Comfort Guides* that were provided with Compaq products shipped to Canada.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on:

7-11-01
DATE

/s/ Mary Kuna
Mary Kuna

SWORN TO AND SUBSCRIBED BEFORE ME, by Mary Kuna, on the 11 day of July, 2001.

JULIA A. KIBBLE
Notary Public, State of Texas
My Commission Expires
JUNE 7, 2003

NOTARY PUBLIC IN AND FOR THE STATE OF TEXAS

/s/ Julia Kibble

APPENDIX R

UNITED STATES COURTS
SOUTHERN DISTRICT OF TEXAS
FILED
MAR 28 1997
MICHAEL N. MILBY, Clerk of the Court

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

COMPAQ COMPUTER CORPORATION,
Plaintiff

Civil Action No.
H-97-1026

v.

ERGONOME, INC. and
STEPHANIE L. BROWN
Defendants

COMPLAINT FOR DECLARATORY JUDGMENT OF NO COPYRIGHT INFRINGEMENT

(Text of Complaint omitted.)

Respectfully submitted,

Date: 3/28/97

/s/ Michael O. Sutton

Michael O. Sutton
Attorney-In-Charge
Texas Bar. No. 19535300
FISH & RICHARDSON P.C.
One Riverway, Suite 1200
Houston, Texas 77056
Tel: (713) 629-5070
Fax: (713) 629-7811
ATTORNEYS FOR PLAINTIFF
COMPAQ COMPUTER CORPORATION

(Attachment to Exhibit A of Compaq's Complaint:)

ERGONOME
Incorporated

TELEPHONE (212) 222-9600 145 WEST 96TH STREET
TELEFAX (212) 222-6699 NEW YORK, NY 10025

March 25, 1994

Ms. Cynthia Purvis
COMPAQ COMPUTER
PO Box 692000
Mailstop 10 08 01
Houston, TX 77269-2000

Re. "The HAND Book (Preventing Computer Injury)"

Dear Cynthia:

In this letter I would like to respond to the request you made during our telephone conversation last Tuesday for information concerning medical acceptance of The HAND Book -- its "credentials", so to speak -- and secondly, to your request for a proposal as to possible conditions for bundling the book with Compaq products.

As you know, The HAND Book Method was created, and the book written, by an internationally known, American concert pianist, Stephanie Brown. Her biography is printed at the end of the book, she writes in the Preface of the relationship she found between the piano and computer keyboards, and in the brochures which accompanied the books I sent you she lays out the medical foundations of her method in technical language. None of this needs repetition here, but I would add that someone had to make the connection between incorrect hand and finger positions and motions at the computer keyboard and consequent injury, and it seems to have surprised no one (including yourself, I believe) that it took a pianist to do it.

When Ms. Brown completed the manuscript for the book last summer, she immediately sent it to six top medical specialists, representing the disciplines most concerned with repetitive stress injury. They were:

- Dr. Peter Amadio, an orthopaedic surgeon specializing in the hand at the Mayo Clinic and author of "The Many Faces of Carpal Tunnel Syndrome" as well as numerous other articles on this and related subjects.
- Dr. Peter Nathan, also an orthopaedic surgeon and hand specialist, who is director of the Portland Hand Surgery and Rehabilitation Center. Interestingly, although he is well known for his advocacy of the position that carpal tunnel syndrome is not work-related, he believes strongly in the effectiveness of The HAND Book, as you will see later in this letter and from the enclosed copy of a letter he wrote to Stephanie Brown.
- Dr. Michael Hodgson, an occupational and environmental specialist at the University of Connecticut department of medicine whose articles in The Journal of Occupational Medicine have drawn considerable attention.
- Dr. Frank Wilson, a professor of clinical neurology, specializing in the hand, at the University of California, San Francisco, and author of several books related to this subject.
- Dr. Nancy Byl, Director of the Graduate Program in Physical Therapy at the University of California, San Francisco, and one of the best-known hand therapists on the west coast.
- Dr. Henry Erle, a senior and highly respected

specialist in internal medicine at New York Hospital.

Their reactions to The HAND Book are enclosed in the form of letters and faxes received by Ms. Brown, on two of which I would like to elaborate as follows:

- Last summer Ms. Brown sent a copy of the manuscript to Dr. Amadio at the Mayo Clinic. He responded with a very thoughtful and encouraging letter to her, including suggestions for a couple of minor changes, which she immediately incorporated into the manuscript. She then sent him a number of copies of the book in its rough, laser-printed, pre-publication form, which he has been using with his patients for the past six months; a letter from one such patient is enclosed. Earlier this month, while dictating a letter to Ms. Brown to request more such copies, he received the book in its final form from us. Today we received a telephone call from a purchasing agent at Mayo informing us that, as a result of Dr. Amadio's experience with The HAND Book and his recommendation of it, Mayo will soon be placing an order for several hundred copies, to be used by four constituencies there:

    - Orthopaedic Surgery, for retraining of pre- and post-surgical patients who are still able to

    - Occupational Therapy Department, for therapy and rehabilitation;

    - Education Department, as preventative medicine for patients;

    - Employee Safety and Health Department, as preventative medicine for Mayo's own.

- The Portland Hand Surgery and Rehabilitation Center's Dr. Nathan draws a distinction between the disease process of carpal tunnel syndrome, which he believes is not work-related, and the symptoms of it, which he believes are. He is virtually unequivocal in his statements as to the efficacy of The HAND Book in controlling those symptoms:
  - "I believe that your book very accurately points out the postural and positional flaws keyboard technique which can lead to a wide variety of musculoskeletal symptoms."
  - "I believe that the information presented in your book may be helpful in preventing or minimizing many of the patterns of musculoskeletal discomfort associated with keyboarding."
  - "I believe that the principles and techniques presented in your book represent a logical and cost effective approach to the control of symptoms associated with keyboarding."

As I mentioned above, the few minor suggestions which these specialists made to Ms. Brown have been incorporated into the first fully published edition, and thus it can be said that the book which you have has been fully endorsed by them. It has since been ordered by a great many doctors, therapists, hospitals and clinics across this country and, as a result of a highly favorable article (copy enclosed) about it written by a chartered ergonomist in The Financial Times, throughout Europe as well. Similar articles have appeared in Computerworld earlier this month and in the April edition of Byte, copies of both of which are enclosed.

As telling as the Mayo Clinic's announced plans for

The HAND Book has been the reaction to it by the California Occupational Safety and Health Administration (Cal-OSHA), whose director, Dr. John Howard, was sent a pre-publication copy of the book in December.

Dr. Howard immediately had the book reviewed in Cal-OSHA's weekly journal, The Cal-OSHA Reporter; a copy of this review is enclosed. Then, last week, a representative of his called and said that Dr. Howard had requested that one copy, initially, of the book be placed in every Cal-OSHA office across the state. A price list was requested, and today a purchase order arrived by fax, of which I enclose a copy.

NIOSH has seen the book at three different stages in its development, and Naomi Swanson, one of the agency's leading experts on the subject of keyboards, made a suggestion which was incorporated into it. Incidentally, the product safety officer of another leading computer company told me that, at a meeting concerning keyboard safety held at NIOSH's offices in Cincinnati earlier this month, both Ms. Swanson and Steven Sauter (another well-known NIOSH keyboard safety researcher and author of "Improving VDT Work") strongly recommended that he get The HAND Book.

The risk management officer at the workers' compensation insurance company with the largest share of the U.S. market (10.7%) has ordered that the book be put into every one of their 135 loss control offices across the country, and, moreover, has ordered 34 copies of the book to take to the next meeting of the ANSI/HFES Standards Committee (of which he is a member) in April, where they will be given to each committee member. This gentleman's counterpart at a workers' comp company with 4.6% of the market has told me that his company may buy a copy of the book for every keyboard worker whom they insure.

In summary, to answer your question as to whether or not a user could sue you claiming that he or she had been injured by doing the keyboard exercises in The HAND Book, I would say the following:

- The author enlisted the counsel of some of the most prestigious medical experts in the field precisely for the purpose of ascertaining that The HAND Book Method, from a medical point of view, had no omissions or inconsistencies, and was completely sound. Every suggestion they made has been incorporated into the book as you have it. I believe that the enclosures and the foregoing information in this letter fully attest to the Method's medical validity, effectiveness and safety.

- We all know that anybody can sue anybody for anything at any time and, these days, they often do so without a second thought. However, I believe that the Mayo Clinic and Cal-OSHA actions of recent days regarding the book already constitute a critical mass of endorsement sufficient to set it well above such claims.

- Users are admonished three times in the book to consult with their doctors in the event of any pre-existing injury, and are warned several times more to stop if anything hurts.

- The beginning of the book contains a very strong warning and disclaimer. It could be strengthened even further if you thought it necessary.

Now to your request for a proposal on how The HAND Book might be offered for bundling with Compaq products:

Firstly, I believe that I brought up in our conversation the idea of possibly making an abridged or excerpted version for bundling purposes. It is an idea which we have considered here at various times during the book's development, but our conclusion, finally, is that it should be abandoned. The book, with the poster, when used as directed, constitutes a complete method for avoiding keyboard-related RSI. In a word, it works. Any abridging or excerpting, no matter how skillfully done, inevitably leaves some risk uncovered and could expose readers with certain deficiencies in their keyboard techniques to unnecessary danger.

There are two basic forms in which The HAND Book could be bundled with Compaq's new products -- as a book, and as software.

BOOK

As you know, the book sells for $19.95 per single copy. Our Enduser Price Schedule varies with quantity from that point down to a bottom of $14.95 for orders of 1,000 or more. You would in effect be re-selling the book if you bundled it with your products, however, so a re-seller's price schedule would be applicable. This is presently scaled from $15.95 down to a low of $9.95, but could be reduced by up to two dollars further for you with increasing volume. We would suggest that following scale:

Order Quantity	Discount	Price
100 to 10,000	50%	$9.95
to 25,000	52.5%	$9.45
to 50,000	55%	$8.95
to 100,000	57.5%	$8.45
above 100,000	60%	$7.95

These prices are FOB Crawfordsville, Indiana. Each book comes with a free copy of the 15x20-inch color workstation poster, "The Twelve Golden Rules for Safe Keyboard Use".

The book and poster as you have seen them could be available in large quantities within one month. If you wanted them customized with the Compaq logo and minor editorial changes (such as the strengthened disclaimer mentioned earlier), approximately two weeks' production time would have to be added to that. Substantial changes in artwork would, of course, require additional time.

SOFTWARE

A contract for creation of the software, which will be Windows-based initially, is in late stages of negotiation between us and a New York software development and training company called Infinity Info Systems. If this contract is concluded in the near future, the first version of the software can be ready by mid- to late summer.

It will be a fairly straightforward rendering of the editorial and graphic content of the book, but with the addition of color accents, simulated motion between wrong-way and right-way hand positions and motions, and selectable menus and roadmaps to and through the various problems of keyboard technique. File size of this first version will be 1400 kilobytes maximum. Subsequent adaptations will be made for DOS and Mac, and eventually we will create a deluxe, interactive version for CD-ROM.

The prices per unit of the initial version of the software will be similar to the book prices above, and, as with the book, a free copy of the workstation poster would be supplied for each unit of software sold. If it turned out that long-term, high volume software usage were contemplated, we could discuss a license governed temporally or in some other sense broader than per-unit pricing.

There are obviously many variations on the foregoing which could be explored -- even a license in perpetuity on the book and/or software for a flat sum, for example -- but in any event I hope that the foregoing will give us a framework for proceeding to find the best means for bringing the safety information contained in The HAND Book to your customers. What is exciting to me is that, although that no one could have foreseen the damage that people could do to themselves by incorrect use of the standard computer keyboard, now that this unfortunate fact is becoming known, Compaq is clearly and swiftly taking a leading, proactive stance on prevention, as evidenced by your call to me last week.

I look forward to continuing our discussions as soon as you have had a chance to evaluate the ideas presented here. Until then, with best wishes,

Sincerely yours,
ERGONOME INCORPORATED

Tom Mowrey

Thomas Mowrey
Vice President

APPENDIX S

CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
FILED
MAY 15 1997
Michael N. Milby, Clerk of Court
Mail - Screened by U.S. Marshal

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

COMPAQ COMPUTER CORPORATION

CIVIL ACTION NO. H-97-1026

vs.

JUDGE: MELINDA HARMON

ERGONOME INCCORPORATED, (sic) and
STEPHANIE L. BROWN

PLAINTIFF COMPAQ COMPUTER CORPORATION'S BRIEF IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS OR, IN THE ALTERNATIVE, STAY

Michael O. Sutton
Texas Bar No. 19535300
FISH & RICHARDSON P.C.
One Riverway, Suite 1200
Houston, Texas 77056
Tel. (713) 629-5070
Fax (713) 629-7811

ATTORNEYS FOR PLAINTIFF
COMPAQ COMPUTER CORPORATION

Of Counsel

Louis Brucculeri, Esq.
Compaq Computer Corporation
20555 S.H. 249
Houston, Texas 77077-2698
Tel: (281) 518-2271
Fax: (281) 518-7188

(motion omitted)

(Excerpt from EXHIBIT A follows:)

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

COMPAQ COMPUTER CORPORATION

Plaintiff

Civil Action No.

v.

H-97-1026

ERGONOME INC. and
STEPHANIE L. BROWN

Defendants

AFFIDAVIT OF CYNTHIA J. PURVIS

1. I currently work part time for Compaq Computer Corporation (Compaq) in Houston in the Human Factors group.

2. I reside at 30 Amber Leaf Court, The Woodlands, Texas 77381

3. I obtained a bachelors degree in psychology from Occidental College in 1974. I obtained a masters degree in Human Factors/Applied Experimental Psychology from California State University at Northridge, California in 1984.

[paragraphs 4-15 omitted]

16. The March 25, 1994 letter continues at the bottom of page 3 by acknowledging that Mr. Mowrey had been exploring ways during our earlier conversation to interest Compaq in The HAND Book. The letter notes that Mr. Mowrey even suggested during the phone conversation "the idea of possibly making an abridged or excerpted version for bundling purposes." However, in the letter, Mr. Mowrey said that such an approach was not desirable because any excerpting, "no matter how skillfully done, inevitably leaves some risk uncovered and could expose readers with certain deficiencies in their keyboard techniques to unnecessary danger." Therefore, Ergonome's efforts from that point forward were directed at interesting Compaq in taking the whole book, or the related software.

17. Mr. Mowrey's letter of March 255, 1994 concludes by presenting prices for "in effect re-selling the book if you (Compaq) bundled it with your products...." Therefore, Mr. Mowrey stated that "We would suggest" a price scale that is set forth on page 4. Those prices start at $9.95 for orders of from 100 to 10,000 and $7.95 for copies over orders of 100,000.

[paragraphs 18-30 omitted]

31. Attached as Exhibit 8 is another internal memo from Dr. Jorna to me dated 1/23/95. This memo records the poor internal reception to Ms. Brown's and Ergonome's marketing efforts as a result of the price of their products that they were proposing:

> "Response of meeting was not to (sic) good due to previous price quote. Will talk to Debra and Ann individually and see if there is a need for an internal meeting."

As I stated previously, the standard procedure within Compaq is to form an interdisciplinary team consisting of business people and lawyers if there is a sufficient degree of interest in an outside product to discuss any further exploration of the potential business venture. When Dr. Jorna refers to an "internal meeting" in Exhibit 8, he most probably is referring to determining the need (or lack thereof) for a meeting to determine whether an interdisciplinary project team should be formed. Because of the lack of interest, an internal team was never formed with respect to the efforts of Mr. (sic) Brown and Ergonome to interest Compaq in The HAND Book or the KeyMoves software.

[paragraphs 31-40 omitted]

/s/ Cynthia J. Purvis

CYNTHIA J. PURVIS

Sworn and subscribed to before
me this 15th day of May, 1997
/s/ Beverly E. McAndrew
Notary Public in and For
The State of Texas
My Commission expires: 8/20/97

APPENDIX T

CLERK. U.S. DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
FILED
07/02/01
MICHAEL N. MILBY, CLERK
BY DEPUTY /s/ H. Tippen

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

COMPAQ COMPUTER
CORPORATION

CIVIL ACTION NO. H-97-1026

vs.

JUDGE: MELINDA HARMON

ERGONOME INCORPORATED,
STEPHANIE L. BROWN, and
THOMAS MOWREY

ERGONOME'S MOTION TO PERMIT EVIDENCE OF ACTUAL DAMAGES AND INFRINGER'S PROFITS

(motion omitted)

FOLLOWING IS EXHIBIT A TO MOTION:

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Civil Action No. H-97-1026
Partially consolidated No.
H-98-3159

Compaq Computer Corporation,

Plaintiff,

v.

Ergonome Incorporated, Stephanie L. Brown and Thomas Mowrey,

Defendants.

Declaration of Thomas Mowrey

THOMAS MOWREY declares as follows:

1. I am the President of Ergonome Incorporated, the defendant and counterclaim plaintiff in this action. I make this Declaration of my own personal knowledge and in support of the Motion to Permit Ergonome to Present Evidence of Damages at Trial.

2. Ergonome has distributed over 10,000 copies of The HAND Book. This distribution includes both outright sales of The HAND Book and agreements licensing the combination of KeyMoves software and The HAND Book. Outright sales of The HAND Book include 600 hundred copies to Apple Computer (100 copies at $16.95 per book and 500 at $15.95), 950 hundred copies to the Mayo Clinic (450 copies at $16.95 and 500 copies at $15.95), 300 copies to the Southern California Gas Com-

pany and 150 copies to the State of California Occupational Safety and Health Administration. Ergonome's corporate customers for The HAND Book in bulk also include corporations such as AT&T, IBM, Hewlett-Packard. The average selling price of all copies of The HAND Book sold is $13.25.

3. The standard license for KeyMoves, Ergonome's software product, includes The HAND Book as part of the licensed materials. This combined package is sold on a "licensed user" basis, meaning that each employee who has access to the book and software must be licensed. A copy of our standard corporate license agreement is attached hereto as **EXHIBIT A.**

4. Such licenses for the combination of software with book have been sold to numerous corporate and government accounts. A list of such accounts is attached hereto as **EXHIBIT B.** This list includes licenses to the Chase Manhattan Bank (53,600 users at $2.95 per user — see invoices attached as **EXHIBIT C** hereto); GE Capital Corporation (44,000 users at $1 per user — see license agreement attached as **EXHIBIT D** hereto); Lawrence Livermore National Laboratories (7,000 users at $2.95 per user); and the Mayo Clinic (2,000 users at $6.95 per user). Other licensees for the combined package of KeyMoves with The HAND Book include State Farm Mutual Insurance Company, the United States Department of Energy, the US Air Force and Stanford University. In all, there are over 110,000 total licensed users of KeyMoves with The HAND Book, at an average license fee of $2.52 per user.

5. Compaq itself initiated contact with Ergonome concerning the HAND Book by requesting that a copy be sent by overnight mail to it while a repetitive stress injury trial against Compaq was ongoing. Compaq thereafter asked for a price quotation, and I responded on March 25, 1994 with a proposed volume discount price of

$7.95. Beginning then, and continuing over the following 23 months, Ms. Brown and I repeatedly met with Compaq personnel at their request; demonstrated our KeyMoves software to Compaq personnel in both Texas and California. Compaq repeatedly asked us for We engaged in substantial and extended discussions concerning **licensing** the products to Compaq, including but not limited to **licensing** The HAND Book or KeyMoves for bundling with Compaq computers. Indeed, this lawsuit was precipitated by my December 10, 1996 letter to Cynthia Purvis (see **EXHIBIT E** hereto) which, *inter alia*, stated:

> "If Compaq would like to proceed to final negotiations for bundling either The HAND Book and/or KeyMoves, please so state, so that we can set out a negotiating schedule, with definite target dates for completion, and then proceed to reach final agreement on feasible **licensing** fees and all other appropriate terms.¶ On the other hand, if Compaq's final decision is to forego **licensing** of the of the book and/or software, then we ask you to state that clearly at this time. [emphasis added]

6. Documents produced in this lawsuit reveal that Compaq gave our products very positive internal evaluations. See three internal Compaq memoranda written by Cynthia Purvis's chief lieutenant, Gerard Jorna, attached hereto as **EXHIBIT F**. Although such Compaq personnel expressed very favorable opinions concerning our products, Compaq ultimately declined to take a license. We therefore were compelled to bring this action to seek damages for Compaq's large-scale infringement of The HAND Book.

7. During discovery in this action, Ergonome repeatedly asked Compaq, in document requests

(see **EXHIBIT G**) and depositions. for data that would permit Ergonome to apportion the relative value contributed by the Compaq Safety and Comfort Guide to the complete package of computers. peripherals and manuals sold by Compaq during the relevant period. Ergonome did so despite the fact that under the copyright statute and caselaw it is the infringer's burden to establish the (sic) Compaq refused to provide any of this information.

7. I declare under penalty of perjury under the laws of the United States of American that the foregoing is true and correct.

Dated: July 1, 2001
Houston, TX

/s/ Thomas Mowrey
Thomas Mowrey

APPENDIX U

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

United States Courts
Southern District Of Texas
Filed
Jun 15 2001
Michael N. Milby, Clerk

COMPAQ COMPUTER CORPORATION,

vs.

CIVIL ACTION NO. H-97-1026
JUDGE: MELINDA HARMON

ERGONOME INCORPORATED and
STEPHANIE L. BROWN

JOINT PRETRIAL ORDER

(omission)

VI. ADMISSIONS OF FACT

(omission)

4. From September 1994 through October 1997, Compaq distributed _________* number of copies of its 1994 Safety & Comfort Guide. (* to be stipulated)

(omission)

19. Compaq never made a counter offer to Ergonome after Ergonome provided Compaq with a price quote in its March 25, 1994 letter to Compaq.

(omission)

SO ORDERED:

Date: ____________

____
Melinda Harmon
United States District Judge

Date: 6/15/01

/s/ Matthew G. Reeves
Michael O. Sutton
Matthew G. Reeves
Attorneys for Compaq

Date: 6/15/01

/s/ Andy Vickery
Andy Vickery
Attorney for Ergonome,
Brown and Mowrey

APPENDIX V

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
FILED
JUL 23 2001
Michael N. Milby, Clerk of Court

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

COMPAQ COMPUTER CORPORATION,	CIVIL ACTION NO. H-97-1026
Plaintiff,	Houston, Texas
vs.	6/28/2001 10:30 a.m.
ERGONOME, INC., STEPHANIE L. BROWN, and THOMAS MOWREY,	
Defendants.	

VOLUME I
PRETRIAL HEARING

BEFORE THE HONORABLE JUDGE MELINDA HARMON
UNITED STATES DISTRICT JUDGE

REPRESENTING

THE PLAINTIFF: MICHAEL O. SUTTON
MATTHEW REEVES
ROD COOPER

THE DEFENDANTS: ARNOLD ANDERSON VICKERY
PAUL F. WALDNER, III
STEPHEN M. KRAMARSKY

Court Reporter: Anne Traylor, CSR, RPR
Official Court Reporter
515 Rusk, Room 8016
Houston, Texas 77002

PROCEEDINGS REPORTED BY MECHANICAL STENOGRAPHY
TRANSCRIPT PRODUCED BY COMPUTER-AIDED TRANSCRIPTION

(Pages 2-5 omitted)

page 6

MR. SUTTON: All right, Your Honor.

Actually, there are two that are related now. We had earlier filed a Motion in Limine that related to keeping out evidence of pricing with respect to The HAND Book, and I believe that that's really somewhat embodied within the latest motions that we filed which was the supplemental Motion in Limine. And that really goes to the defendant's damage theory, Your Honor.

I just note that until this past Monday, which was of course five days before trial, we had one theory that the defendants were presenting in terms of damages that they were approaching. And we had -- in connection with that we

Page 7

had two pieces of paper.

The first page -- and it's Defendant's Exhibit No. 7. It's listed on their exhibit list as summary of the defendant's actual damages; and here, in fact. it's entitled "Ergonome's Actual Damages."

And their approach is to take one of three numbers. either their full retail price or their average retail price or a discounted retail price, subtract out their printing costs. and multiply that times the number of allegedly infringing booklets here. And that yields numbers, literally, ranging from 285 million, as a minimum, dollars, up to $838 million.

And, Your Honor, I would just note that in an order that you entered yesterday, you cited to the Davis versus Gap case.

In that case, there was a situation where the plaintiff there -- or the defendants, actually, had allegedly infringed by taking a photograph and including it in two and a half million distributions.

And the plaintiff there argued that it was entitled to one dollar times two and a half million dollars -- two and a half million distributions for two and a half million dollars. And the Court there said that that number was wildly inflated; and, Your Honor, I suggest that that characterization is certainly appropriate here as well.

Page 8

These numbers are nothing more than just being purely theoretical and purely speculative.

So, beyond this right here, we have no expert report. The only thing that's mentioned in the pretrial order is actual damages. And now the defendants, in the face of our Motion in Limine, it seems like they're either changing their theory, modifying it, supplementing it or something; and, Your Honor, I suggest that now is not the time to be doing that.

Either they're changing their theory at this last minute, or they've been sandbagging us. In either case, it's not appropriate. Here we are the week before trial. It's certainly a surprise to us. It's a new theory. And -- so, let me -- let me address this entire issue from the beginning.

THE COURT: All right.

MR. SUTTON: There is -- in terms of actual damages, you've got to have an infringement; and you've got to have a loss of sale by the copyright owner, an actual loss. And there has got to be something between those two. It's got to be a link. There has got to be causal connection.

And here, the defendants acknowledge, I mean, in their latest briefing, they acknowledge that they could not have sold and would not have sold those 46 million copies of The HAND Book to Compaq's customers. They acknowledge that. So, their theory is that they would have made those sales to Compaq, to Compaq.

In one of the cases that they cited, it's Encyclopedia versus HBO, even in that case the Court there says, "It is however worth emphasizing that as is the case with claims and law sales involving third parties, the burden rests squarely with the plaintiff to demonstrate that it would have made the sales to the defendant."

They've got to establish they would have made those sales to the defendant, or in this case, the plaintiff, Compaq, but for Compaq's infringement.

Now, what they base that on is a letter that Mr. Mowrey sent to Ms. Purvis at Compaq; and in that letter he makes what he calls a proposal. He set out prices. Compaq never responded to that. Compaq would not have bought that, and their actions indicate that they would not have bought 45 million copies at $8 a copy. So, the defendants cannot demonstrate Compaq would have bought but for the infringement. There is just simply no evidence of that.

Now, I would also point out to you, Your Honor, that the defendants' actions, their own actions, show that they wouldn't have made those sales to Compaq or anyone else. Here I've got a board, and this traces the -- it's a

Page 10

summary of the dealings between Ergonome and Compaq, relating strictly to The HAND Book. Mr. Mowrey called to talk to Ms. Purvis on March 22nd. March 25 he sent the letter that I mentioned to you.

And by the way, I should note that he was not setting out a license fee which is -- may be important here. He was setting out a price to sell the book to Compaq.

So, he sends the letter; and he said to you -- he said at the end of the letter, "I look forward to continuing our discussions as soon as you have had a chance to evaluate the ideas presented here."

There was never again any discussion concerning The HAND Book. Never. ...

(Remainder of page 10, and pages 11-18, omitted)

Page 19

THE COURT: All right.

MR. VICKERY: Procedurally what we have before the Court, although it is denominated in the Motion in Limine, is really an untimely Motion for Summary Judgment on lack of damages.

The cutoff under your order was January 18th, I believe, for that; and that's what this really is, is a Motion for Summary Judgment. So, the papers are a Motion for Summary Judgment; and they're untimely.

The argument that we heard, procedurally, is really a jury argument for the trier of fact to weigh, much as you did, Your Honor, when you were the trier of fact in ^ Kathryn Trigo.

You considered it and even wrote about the number of copies and the fees that would customarily be charged on a per copy basis, opted instead to award under the second -- on the infringer profits prong on the statute. But the point being, procedurally, that's for the trier of fact to consider all of the evidence and weigh it.

Procedurally, we're being accused of coming up with this license theory. At the end, the Court will see that Mr. Mowrey's letter of March 25th in 1994 specifically talked about licensing as a possibility, one of the possible economic solutions that could be resolved.

Page 20

The only -- the only new twist or quirk, if you will, Your Honor, is that the On-Davis case, which just came down a few weeks ago, and which I see the Court found before you even read our papers. It does suggest that the license fee that the infringer would have to pay can be either viewed under the actual damages component or under the infringer's profits component, either way. And so, we pointed that out in our briefing, as Mr. Kramarsky will address to you.

But, procedurally, that's where we are today. We do believe, have believed all along, that an infringer must pay for each and every copy. I mean, it would be an incredible anomaly, as On-Davis points out, for an infringer to say, well, I'm going to take your stuff but I'm going to publish 46 million unauthorized copies but then I'm going to swear I never would have bought it in the first place; so, got you.

Even though they're 46 million copies, all you get is 100,000 or $300,000 in statutory damages. That would allow them, as the On-Davis court said, to steal with impunity. With that, I will punt the ball to my colleague, Mr. Kramarsky.

... Page 21

MR. KRAMARSKY: Good morning, Your Honor. ... I'd like to just reiterate what Mr. Vickery said. The fundamental rule of the copyright law has to be that it is less expensive to negotiate than to steal. If there is proof of infringement, then it has to be that the person who did the stealing should be economically disadvantaged by having stolen.

To say, at whatever damages level, that we could have printed 46 million infringing copies and be liable only for statutory damages, whatever that amount is, simply flies in the face of the purpose of the copyright law, whether it's compensating the copyright owner in the case of actual damages or preventing infringement in the case of infringer's profits.

(Remainder of page 21, and pages 22-43, omitted)

Page 44

MR. SUTTON: And it seems to me that the first issue you've already resolved. That was -- the issue is -- and we had filed a motion in limine to preclude any reference to repetitive stress injury. You ruled yesterday that repetitive stress injury, you agreed with us that it was not relevant and it should not come in.

THE COURT: Right.

MR. VICKERY: So, I think that's already disposed of.

THE COURT: Okay.

MR. VICKERY: I disagree entirely, Your Honor. What you ruled yesterday was that we could not have the -- what I would readily admit to the Court is the blunder bust discovery that my predecessor asked for on that issue. But the Court also said, relying on Compaq's own statement, if what you want to do is show evidence of their motive, the information that you have in hand already is adequate to do that.

Now, Mr. Sutton cannot put on a fair use defense and talk about the use that they made of it in the commercial use without talking about the fact that it was -- they took these expressions to protect themselves against

Page 45

RSI litigation. We don't intend to try an RSI litigation case.

And, you know, frankly, as the Court knows, I came in in late November, and I tried in responding to this motion to back off of what I candidly admit was an overbroad discovery request.

But the testimony that we have already in the can from their people, about 15 minutes worth of testimony from Mr. McFall, which we'll get to, I think, in item 14 on this list -- he's going to be on vacation next week; and so. I've arranged pursuant to your -- I have read your procedures -- pursuant to your procedures to accommodate him with a video deposition tomorrow morning and that's about 15 minutes or so, but we've absolutely got to put on evidence of their motivation to do this in order to respond to Compaq's fair use defense.

So, I didn't read the Court's order saying the evidence is out. I just read the Court's order, as very appropriately, I must confess, saying you've asked for too much, and I'm not going to let you have that; but you didn't say we couldn't use what we have already.

THE COURT: I'm looking for what I said.

MR. SUTTON: Your Honor, I can read what you said.

THE COURT: Okay. What did I say?

MR. SUTTON: In fact, you quoted what I said in the

brief, which was we were trying to keep out in discovery, and we informed Mr. Vickery of this, that we were taking a hard line, quite frankly, on the RSI because they wanted to go into everything. So, we prevented discovery on RSI; and they had information during discovery about the lawsuit since it was public information.

So, my statement was, well, if they want to prove motive, they can do that through what they've already got and nothing more; but then -- and you quoted that, and I of course said that, but you went on and you pointed that motive is not an element of copyright infringement.

You said the Court rejects the argument. referring to their argument. "For one's motive to infringe does not bear on the willful nature of the infringement." And you went on and said that "Willfulness is defined as knowing infringement."

So, RSI doesn't come in and shouldn't come in at all. Motive is not an issue, as you've already ruled. Willfulness, I suppose, might relate to fair use but certainly motive does not and it's -- willfulness, as you've defined, is knowing infringement. So, it seems to me you've ruled on it. We ought to stick with that ruling, and RSI is out.

MR. VICKERY: Judge, the Supreme Court said at least three times in Harper and Row that fundamental to the

notion of fair use is good faith and fair dealing.

Now, that's not just a question of willfulness in the very technical sense that the Court wrote about. It's a question of your underlying motives.

And -- I mean, here is the deposition of Mr. Doug James. He was asked, was it your understanding that the Safety & Comfort Guide was being put together, at least in part, to avoid Compaq's liability for such lawsuits? Answer, yes.

Ms. Purvis has already testified in her deposition that the lawyers were all over them to get this infringing book out. She didn't say the word "infringing;" but the '94 guide out, that the lawyers were all over them to do that, that there was some urgency about it from the lawyers.

And I suspect that the testimony we'll hear from Mr. McFall is along the same lines. We don't need to retry RSI lawsuits, don't intend to; but what we do need to show is that Compaq had a compelling business reason. And it goes under the "use" prong of the "fair use" doctrine, what was the purpose. The "purpose" prong of the statutory criteria for "fair use." I can't respond to his "fair use" defense without that.

MR. SUTTON: I disagree, Your Honor, for a variety of reasons. One -- first, the question that you heard there

was, did Compaq put out the '94 guide at least in part to prevent liability? And Mr. -- yeah, I suppose his answer was yes. He was referring to -- and the follow-up question was never what part; but what Mr. James was talking about was the wording, which you have already ruled yesterday that the warning is out as well.

Now, Ms. Purvis did not testify that the attorneys were all over her to get it out. What -- the question in the deposition, as I recall it, was, were deadlines being set? And I think Mr. Vickery couched it in terms of, were the lawyers all over you? She said deadlines were being set. I mean, deadlines are set all the time. We're here on a deadline.

So, the RSI liability issue shouldn't come in at all. Based upon your ruling yesterday, motive is not an element. Willfulness is defined as knowing infringement, and Mr. Vickery can respond to our fair use defense by trying to prove that we knowingly infringed. That's the issue, not RSI.

MR. VICKERY: I've got to show under the statute -- I'm sorry, Judge. I know there is always a danger for a lawyer to think, well, I've got to talk last or the Judge won't rule in my favor; and I don't want to do that. But this Court has tried enough products liability cases that you know that there is a symbiotic relationship between warnings and instructions that -- I mean, the patterns of recharges in Texas are exactly the same way that you --

To give an adequate warning, you have to warn about the danger; and you have to give instruction for safe use.

So, this information on how to avoid repetitive stress injuries and keyboard use was central to them having an adequate defense to ward off these kind of claims.

And, I mean, if I'm precluded from putting on that motive, that motive of why they did that, I simply can't respond to the fair use defense.

THE COURT: I just don't understand that argument, Mr. Vickery. Maybe I'm just dense. I don't understand how you can't respond to the fair use defense without bringing up a bunch of lawsuits.

MR. VICKERY: I don't have to bring --

THE COURT: Because it's so obvious to me that if you want to bring up lawsuits is, Compaq gets sued for this all the time, to show to the jury these people are bad folks because they caused repetitive stress syndrome.

MR. VICKERY: No, no, no.

THE COURT: That's exactly what you're trying to do.

MR. VICKERY: No, it's not. That's not it at all.

Page 50

They haven't been sued in years for that.

The problem -- what I want to show is that they had a problem then: and when we look at the nature and the character of the use, they made the commercial character, which is -- and it's right in the statute, Harper and Row discusses it, you've discussed it in your March 27th opinion, when we look at their reason for wanting this information, the safety information in their new safety guide, it was to protect themselves against litigation.

We're not going to get into the magnitude of their claims, how many claims there were and whatever; but I've got to have some leeway to show the jury that there was this danger out there, this was why they needed and wanted this information, and, you know, we had the best thing going, frankly. We had the best thing going. We had lots of medical endorsements from people, including one of their experts that testified for them in the Heard trial right at the very time that they ordered The HAND Book.

THE COURT: Okay. Compaq could have a totally -- could have had a totally altruistic reason for doing this. They could have said to themselves when they were developing their computers, you know, if you don't use this right, you might get repetitive stress syndrome. So, let's go out and try to find something that would help our consumers to avoid that altogether.

Okay. That's what could be presented to the jury as a reason why they did this.

MR. VICKERY: Right.

THE COURT: But you wouldn't like that because you know that, in fact, they were sued because people did get or allege that they got repetitive stress disorder because they used the computers; and so, Compaq, in order to protect itself from lawsuits, also wanted to put out something so they could say to the jury, when they were sued for repetitive stress, we told them there was a problem, and we told them how to solve it.

Okay. Now, neither one of those motivations has anything to do with infringement. I don't see -- or fair use or anything else. It doesn't make any difference why they wanted to develop it. They developed it.

MR. VICKERY: Well, I --

THE COURT: I wouldn't let Mr. Sutton get up here and say, oh, they're so altruistic. They're such good guys. They wanted to develop this thing just to help out their consumers.

I wouldn't let him do that. Why? Because it's not true. But I also wouldn't let -- I'm not going to let you go up there and say, they have all these lawsuits and that's why -- and they want to protect themselves because it's not relevant. It doesn't make any difference

why they wanted to do it.

MR. VICKERY: Okay.

THE COURT: They did it. They either did it rightfully or wrongfully.

MR. VICKERY: I'm not going to beat a dead horse.

THE COURT: All right.

MR. VICKERY: What I'd like to do at the appropriate time, Your Honor, is make an offer of proof on it just so the record is clear.

THE COURT: All right. All right.

(Pages 53-114 omitted)

CERTIFICATE

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

7/10/2001 /s/ Anne Trayler
Anne Traylor, CSR,

RPR

APPENDIX W

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
FILED
APR -2 2003
Michael N. Milby, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

COMPAQ COMPUTER CORPORATION,

vs.	NO. CA-H-97-1026
ERGONOME, INC.,	HOUSTON, TEXAS
STEPHANIE L. BROWN, and	JULY 5, 2001
THOMAS MOWREY,	9:00 A.M.

Corrected
TRANSCRIPT OF TRIAL PROCEEDINGS BEFORE THE HONORABLE MELINDA HARMON

VOLUME III

APPEARANCES:

FOR THE PLAINTIFF:	MICHAEL O. SUTTON LOCKE, LIDDELL 600 TRAVIS, #3400 HOUSTON, TX 77002
FOR THE DEFENDANT:	ARNOLD A. VICKERY PAUL WALDNER VICKERY & WALDNER 2929 ALLEN PARKWAY HOUSTON, TX 77019

(Pages 3-76 omitted)

MR. VICKERY: Your Honor, I will limit my offer, in view of the Court's prior rulings, to the fair use issue

and accept a limiting instruction that there is no way that I can respond to a fair use defense if I do not show the extent to which they have used this copied material.

MR. COOPER: What does that relate to?

MR. VICKERY: The nature and extent of the use.

THE COURT: What do you mean numbers?

MR. VICKERY: The number of copies they made, Your Honor, is certainly relevant to the fair use defense.

MR. COOPER: In your motion in limine, this is already excluded information.

MR. VICKERY: I don't see how on earth I can respond to a fair use defense.

MR. COOPER: It is not the number. The nature and extent is not the number. It is not the number. It is how they used.

MR. VICKERY: Of course it is the number, Your Honor. The Supreme Court, Congress has said that the nature and extent of the use is one of the statutory factors.

Second, Harper and Row, in interpreting the statute says that to take fair dealing, permeate it, and that you have to look carefully at each of those factors. There is just no way I can respond to a fair use defense. We are being given an affirmative defense to our whole case. If I can't show the extent --

THE COURT: I don't think that fair use has to do

Page 79

with how many times it goes out. It has to do with what you used.

(Pages 79-104 omitted)

I, JACKIE SMITH, CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE RECORD OF PROCEEDINGS IN THE ABOVE ENTITLED MATTER.

/s/ Jackie Smith — 1/13/02 (sic)
JACKIE SMITH — DATE

APPENDIX X

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
FILED
APR -2 2003
Michael N. Milby, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

COMPAQ COMPUTER CORPORATION,

vs.
ERGONOME, INC.,
STEPHANIE L. BROWN, and
THOMAS MOWREY,

NO. CA-H-97-1026
HOUSTON, TEXAS
JULY 3, 2001
9:00 A.M.

Corrected
TRANSCRIPT OF TRIAL PROCEEDINGS BEFORE THE HONORABLE MELINDA HARMON

VOLUME II

APPEARANCES:

FOR THE PLAINTIFF:
MICHAEL O. SUTTON
LOCKE, LIDDELL
600 TRAVIS, #3400
HOUSTON, TX 77002

FOR THE DEFENDANT:
ARNOLD A. VICKERY
PAUL WALDNER
VICKERY & WALDNER
2929 ALLEN PARKWAY
HOUSTON, TX 77019

(Pages 4-203 omitted)

WITNESS
CYNTHIA PURVIS
Direct by Mr. Vickery

(page 204)

Q. You had never seen either of these three-word phrases, "angled-wrist position" or "the natural line" anywhere before you had seen them in Stephanie Brown's The HAND Book, is that correct?

(page 205)

A. In that exact order, that's correct.

(page 210)

Q. Is there anywhere that you think before this litigation, during the litigation, up this to moment in time, anywhere you have seen a page in a manual book and instruction guide of any kind that shows two pictures, one on top of the other, the top picture showing how to avoid ulnar deviation the wrong way, the incorrect way, the bottom picture showing how to properly place hands on a keyboard and both pictures being captioned "angled wrist position," "the natural line." Have you seen that anywhere?

A. No.

Q. Except Stephanie Brown's book?

A. True.

Q. There is one other place, isn't there?

A. That is the pages in our Safety and Comfort Guide.

(page 218)

Q. Illustration No. 6 in this draft, does it refer to the

(page 219)

top picture in Stephanie's book?

A. It absolutely refers to the body posture in No. 6 of Stephanie's book. I have always been very clear about that.

Q. Is Illustration No. 6 the top picture on Page 14 of Stephanie Brown's book?

A. Yes, it is.

Q. Illustration No. 7 is the bottom picture, correct?

A. Yes, it is.

Q. Illustration on Page 18 is the top picture on Page 18, isn't it?

A. Yes, it is.

Q. And illustration from Page 19 is the picture of Stephanie's hand on Page 19, isn't it?

A. Yes, it is.

(pages 220-258 omitted)

I, JACKIE SMITH, CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE RECORD OF PROCEEDINGS IN THE ABOVE ENTITLED MATTER.

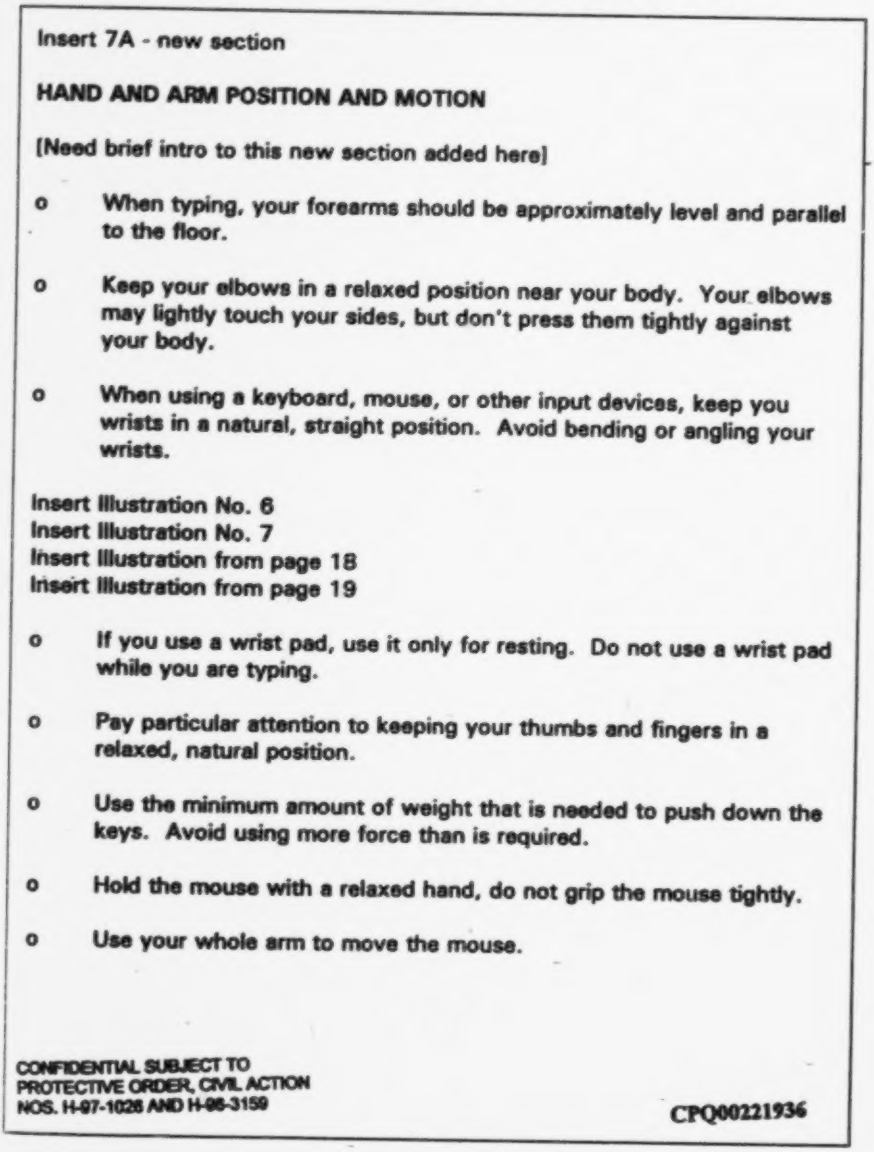
/S/ Jackie Smith — 1/13/02 (sic)

JACKIE SMITH

DATE

APPENDIX Y

Purvis Manuscript for Compaq's SCG



Insert 7A - new section

HAND AND ARM POSITION AND MOTION

[Need brief intro to this new section added here]

o When typing, your forearms should be approximately level and parallel to the floor.

o Keep your elbows in a relaxed position near your body. Your elbows may lightly touch your sides, but don't press them tightly against your body.

o When using a keyboard, mouse, or other input devices, keep you wrists in a natural, straight position. Avoid bending or angling your wrists.

Insert Illustration No. 6
Insert Illustration No. 7
Insert Illustration from page 18
Insert Illustration from page 19

o If you use a wrist pad, use it only for resting. Do not use a wrist pad while you are typing.

o Pay particular attention to keeping your thumbs and fingers in a relaxed, natural position.

o Use the minimum amount of weight that is needed to push down the keys. Avoid using more force than is required.

o Hold the mouse with a relaxed hand, do not grip the mouse tightly.

o Use your whole arm to move the mouse.

CONFIDENTIAL SUBJECT TO
PROTECTIVE ORDER, CIVIL ACTION
NOS. H-97-1026 AND H-98-3159

CPQ00221936

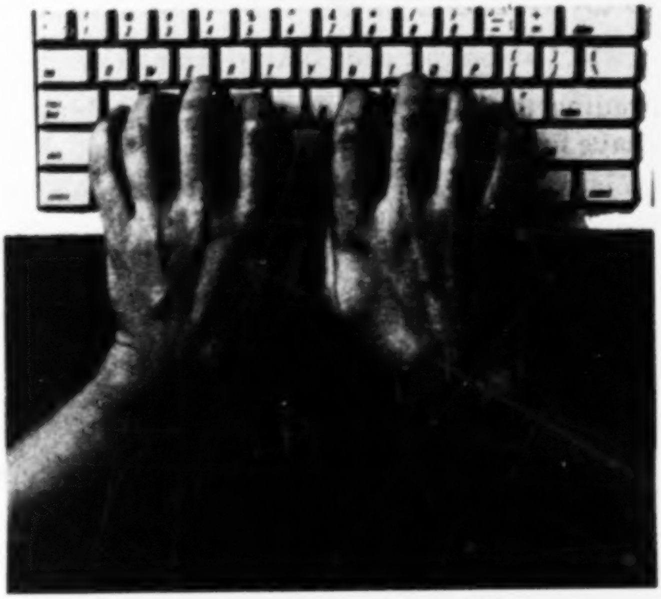
APPENDIX Z

Tables of Infringed and Infringing Materials

In the following tables, Ergonome's copyrighted expression is presented on the left side of each double-page spread, and Compaq's copies are presented on the right

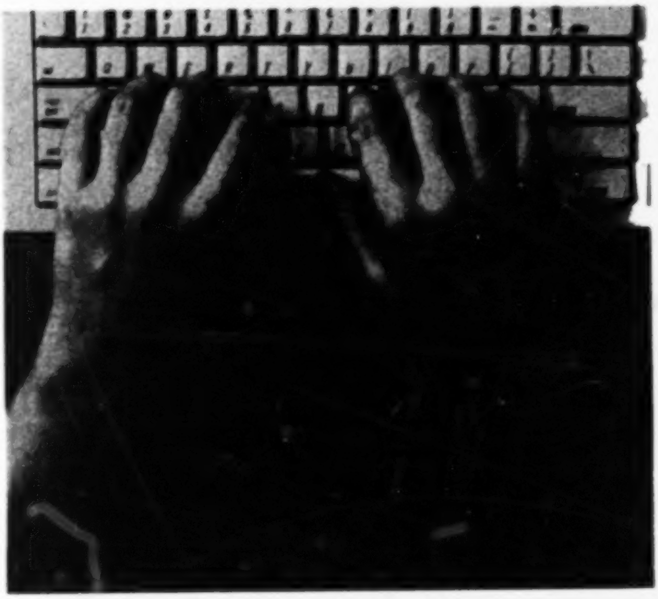
Ergonome's THB, page 14

Illustration No. 6



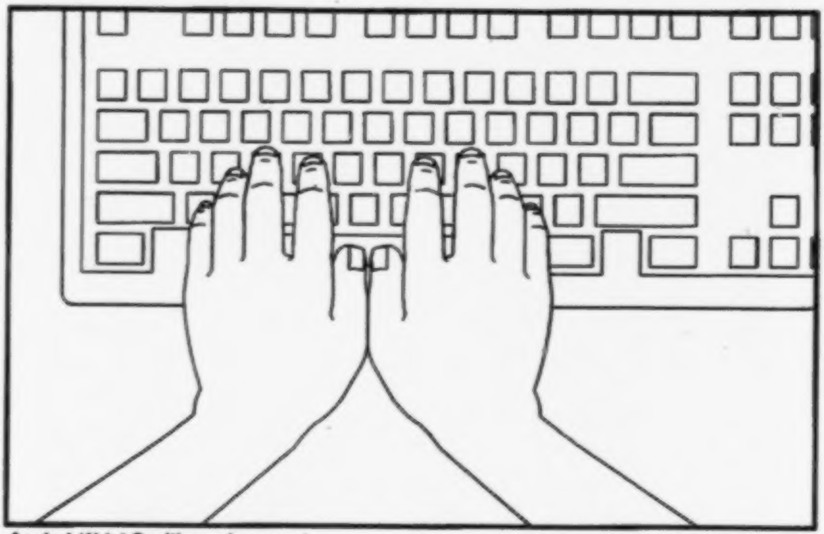
Angled-wrist position - No

Illustration No. 7

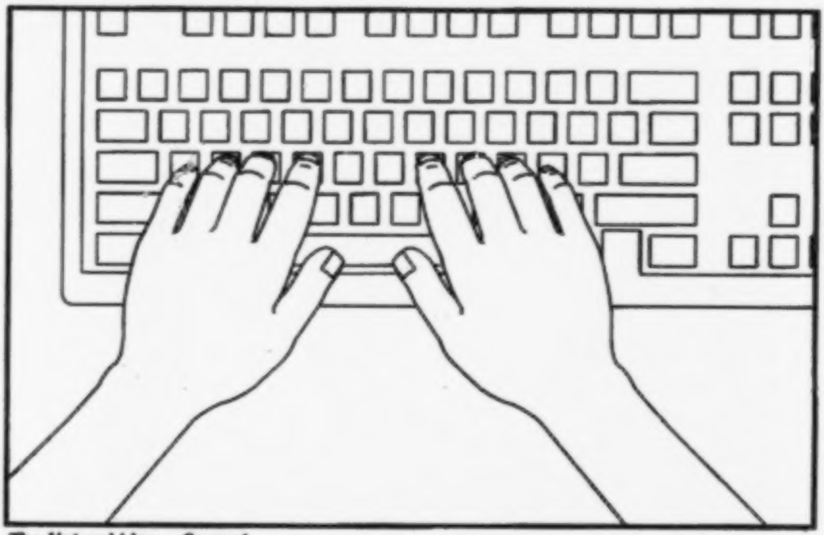


The Natural Line - Yes

Compaq's 1994 SCG, page 1-5

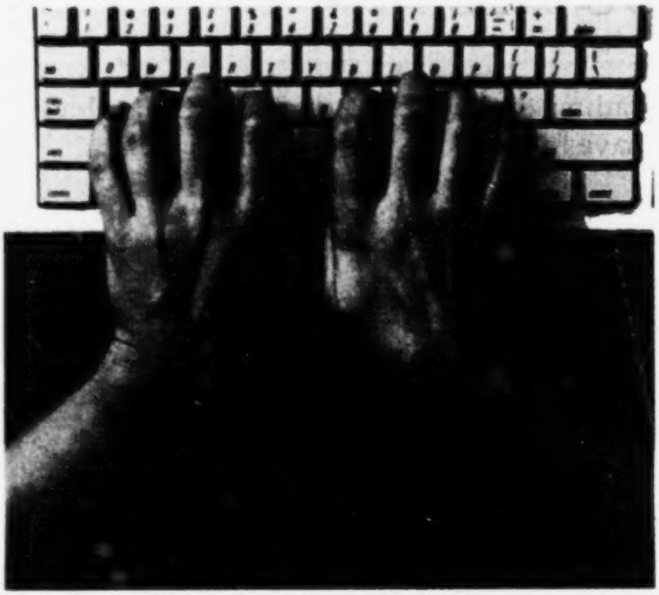


Angled-Wrist Position—Incorrect



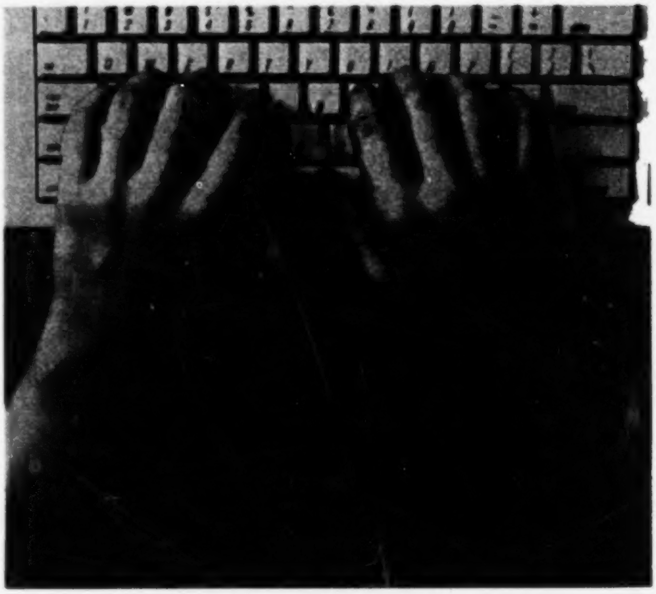
The Natural Line—Correct

Illustration No. 6



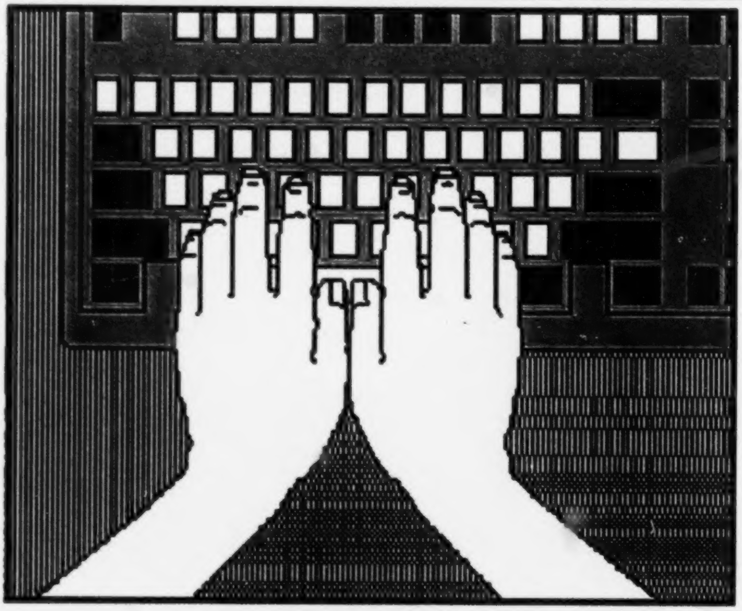
Angled-wrist position - No

Illustration No. 7

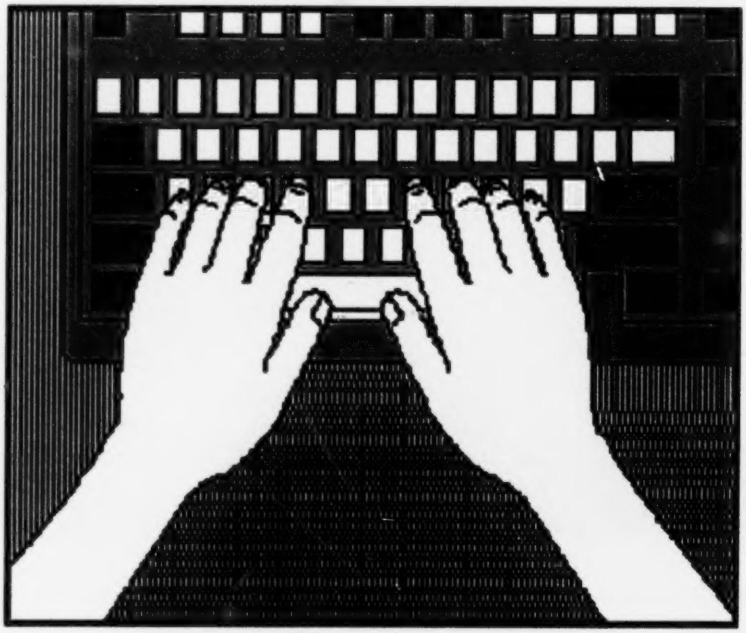


The Natural Line - Yes

Compaq's 1995 SCG, page 1-5



Angled-Wrist Position—Incorrect



The Natural Line—Correct

Ergonome's THB, pages 18 and 19

Illustration from page 18

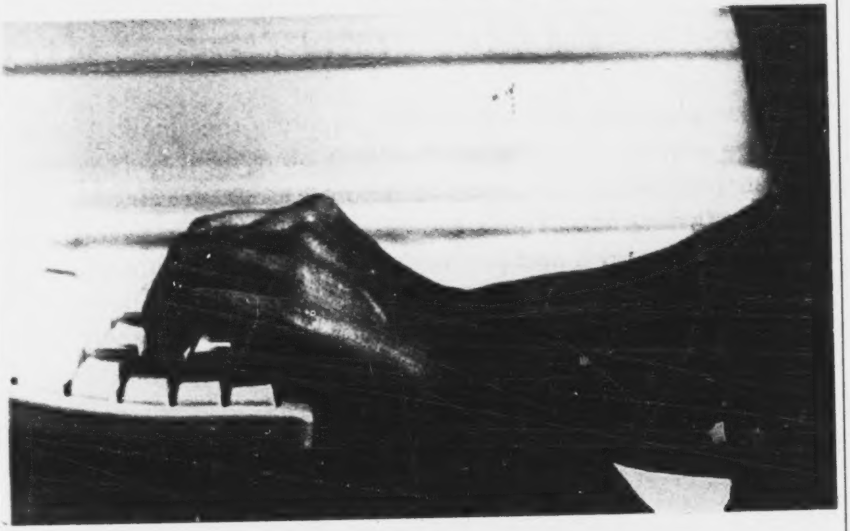
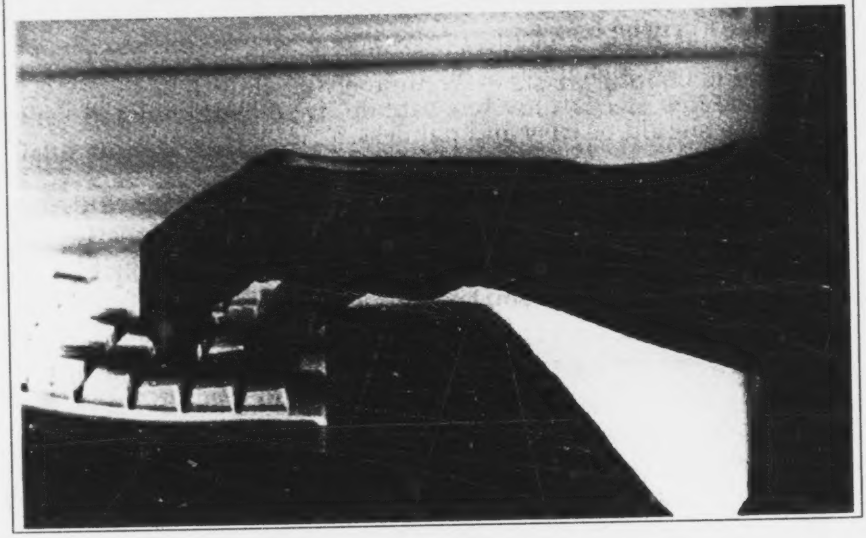
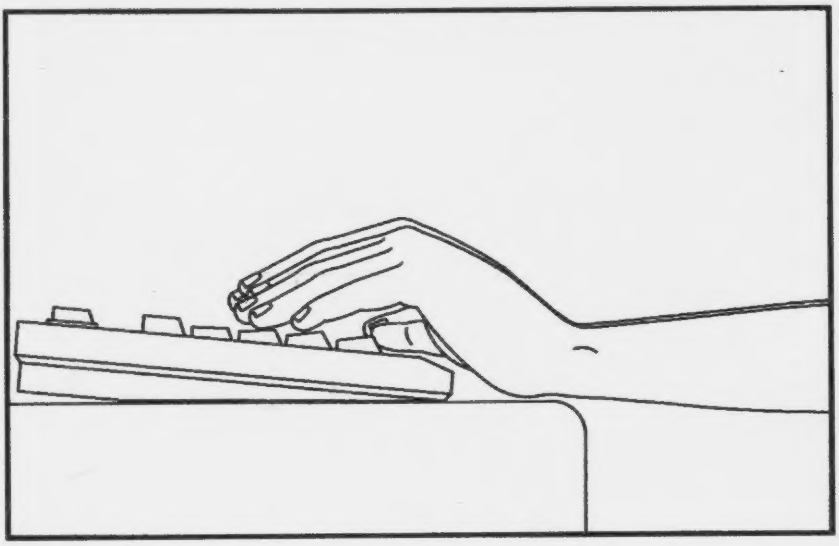


Illustration from page 19

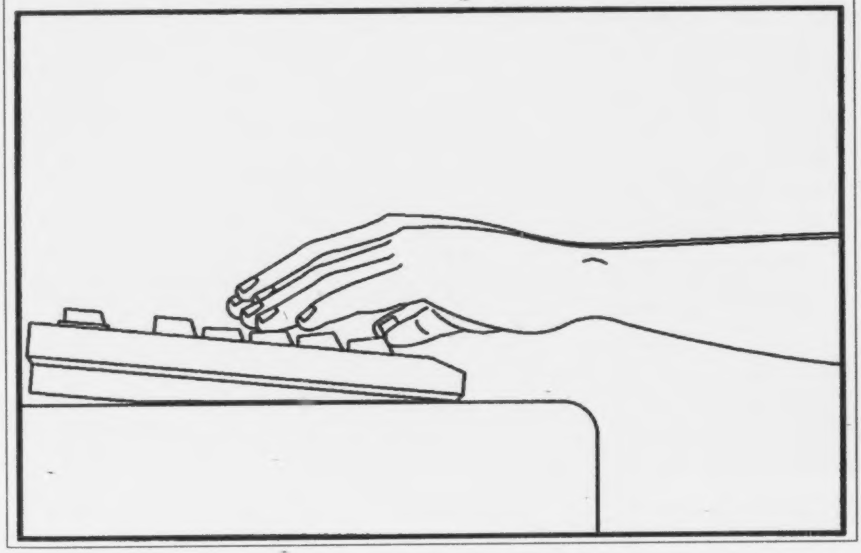


Compaq's 1994 SCG, page 1-6

Top Illustration



Bottom Illustration



(h). Ergonome's THB, pages 18 and 19

Illustration from page 18

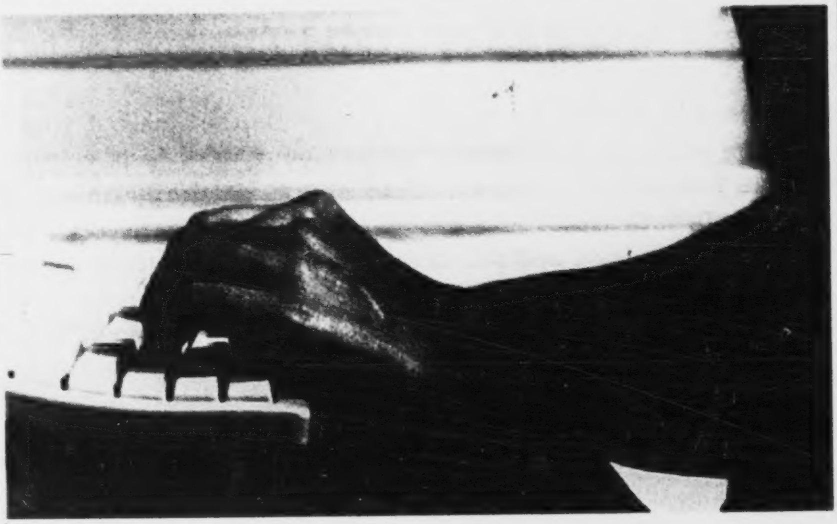
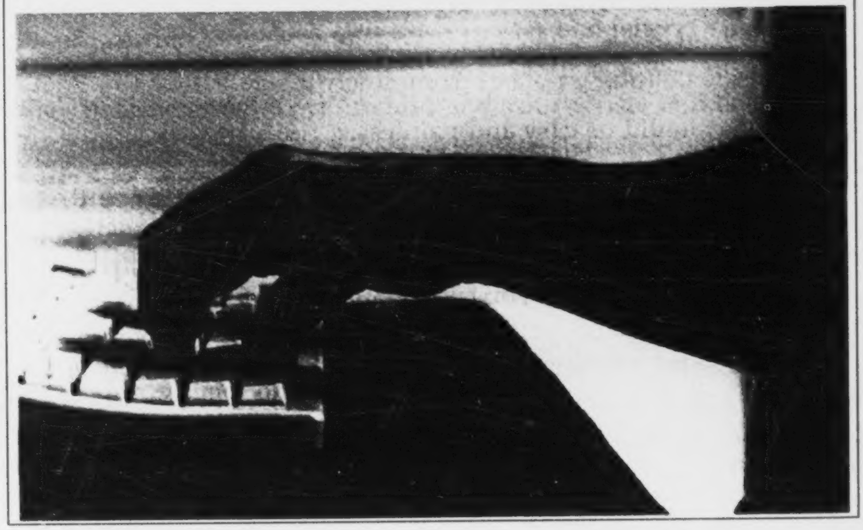
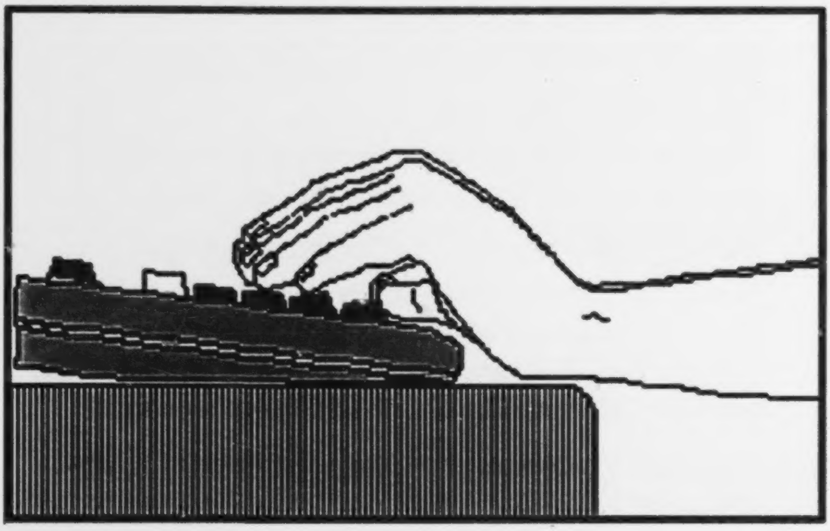


Illustration from page 19

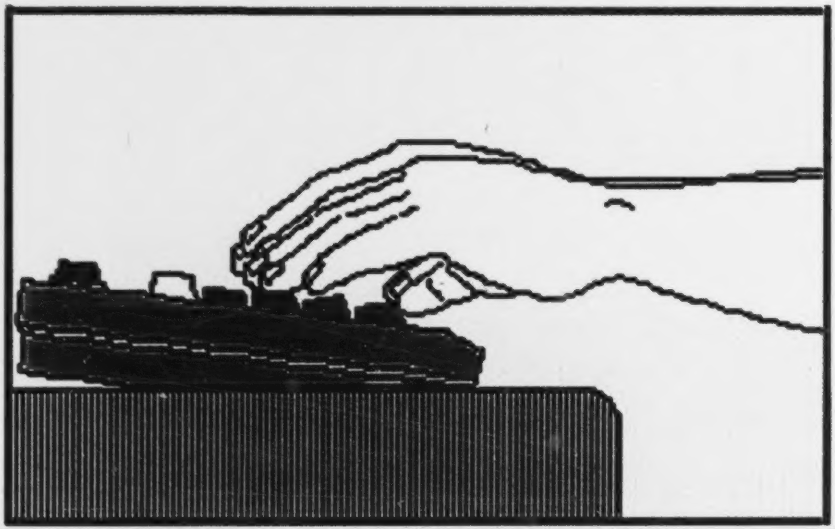


Compaq's 1995 SCG, page 1-6

Right Illustration



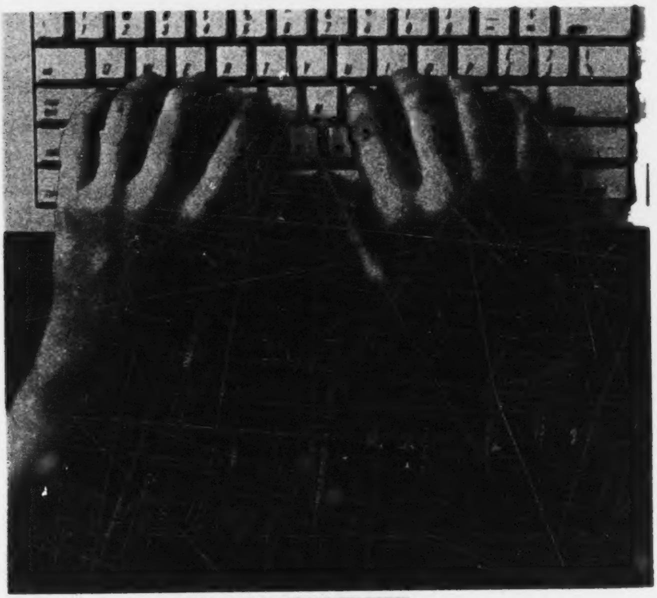
Left Illustration



Textual Passages from Ergonome's THB

Page	Text
TOC	The Natural Line and the Dangerous Angle.
8	THE NATURAL LINE AND THE DANGEROUS ANGLE
9	*The Natural Line and the Dangerous Angle*
9	The Natural Line - Yes
10	*The Natural Line and the Dangerous Angle*
11	*The Natural Line and the Dangerous Angle*
12	*The Natural Line and the Dangerous Angle*
15	Place your hands on the keyboard, just as we did in Chapter One, and without typing, move from the natural line (Illustration No. 7) to the angled wrist position (Illustration No. 6) and then back again.
56	Use your whole arm, and keep the Natural Line (see page 9).
92	Keep the Natural Line.

Illustration No. 7

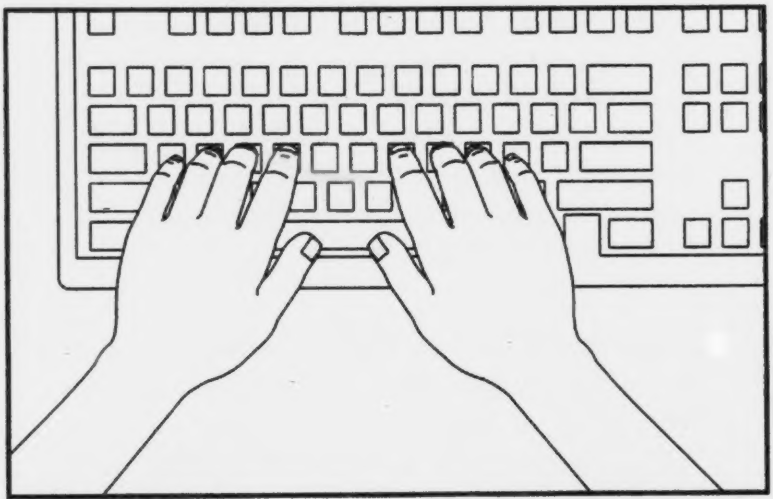


14 **The Natural Line - Yes**

Textual Passages from Compaq's SCG

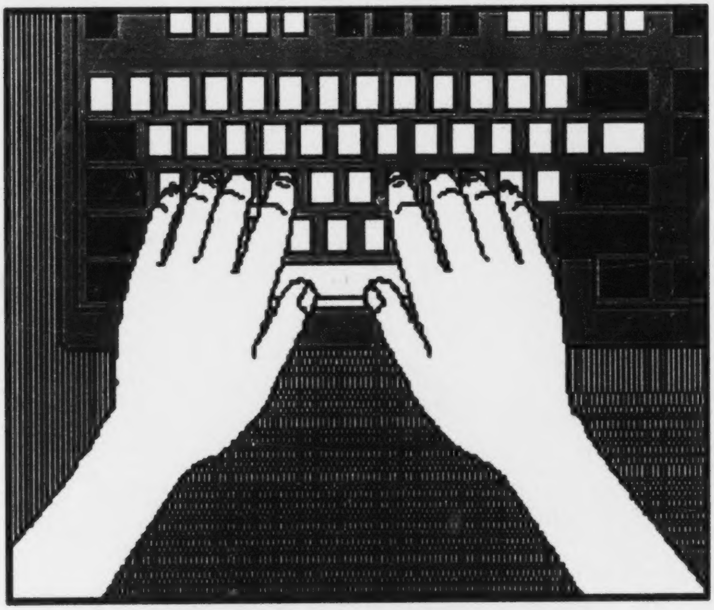
Page Text

Compaq's 1994 Guide



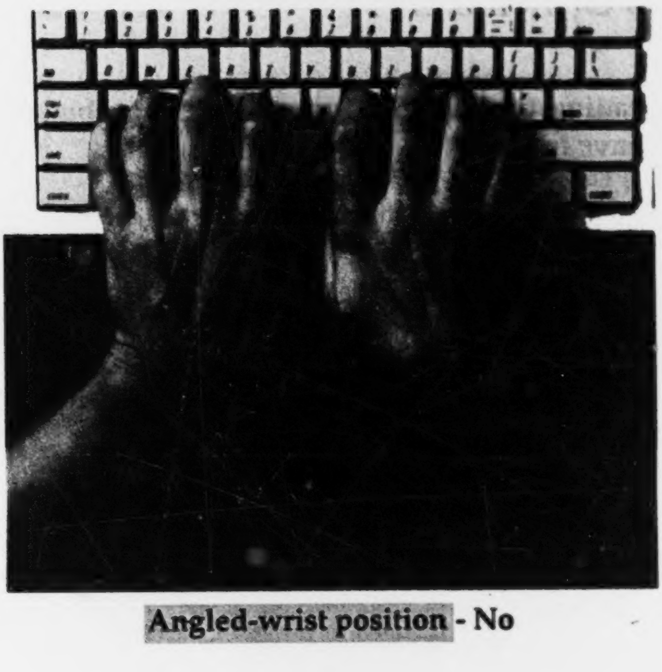
1-5 *The Natural Line-Correct*

Compaq's 1995 Guide



1-5 The Natural Line -Correct

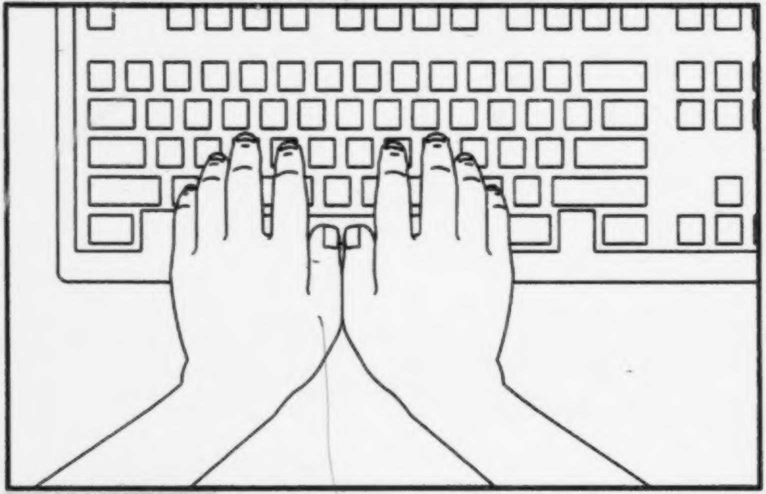
Textual Passages from Ergonome's THB

Page	Text
11	Once you've felt how uncomfortable it is to wiggle your fingers in the angled wrist position, just imagine that many people (and maybe you) are spending anywhere from 20 to 60 hours a week with their wrists in that position. ... The angled wrist position is unnatural for your body and is one of the leading causes of crippling computer injuries.
15	Place your hands on the keyboard, just as we did in Chapter One, and without typing, move from the natural line (Illustration No. 7) to the angled wrist position (Illustration No. 6) and then back again.
14	*Illustration No. 6*  **Angled-wrist position - No**

Textual Passages from Compaq's SCG

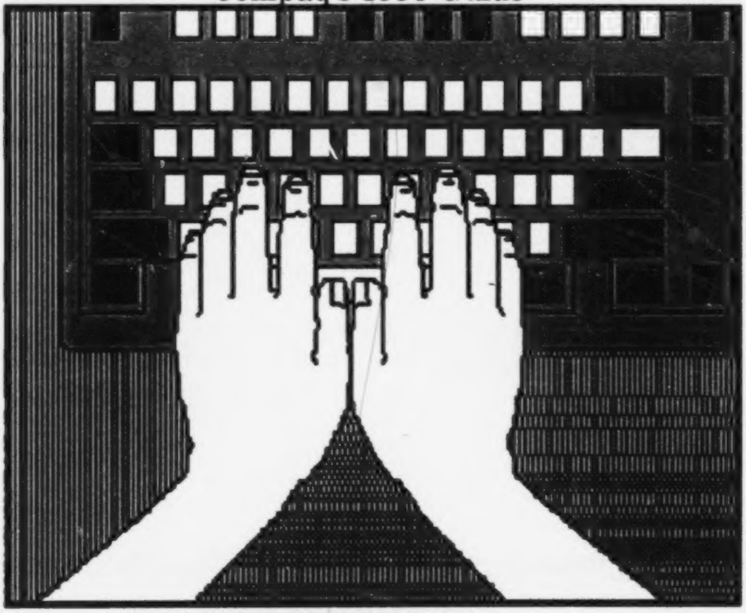
Page Text

Compaq's 1994 Guide



1-5 Angled-Wrist Position-Incorrect

Compaq's 1995 Guide



1-5 Angled-Wrist Position -Incorrect

Textual Passages from Ergonome's THB

Page	Text
90	When you're typing, the line of your forearms should be approximately level and parallel to the floor ...
17	The optimum height is one where your forearms are approximately level and parallel to the floor ...
21	Your elbows ... probably will be lightly touching your sides, although this depends on your particular build.
22	Your elbows may or may not be touching your sides lightly, depending on your physique.
55	Don't angle your wrist from side to side, cutting it off from your arm.
37	Find the minimum amount of weight you need to push down a key.
55-56	Now for mousing techniques ... Use your whole arm and keep the Natural Line.

Textual Passages from Compaq's SCG

Page	Text
1-4	When typing, your forearms and wrists should be level and parallel to the floor.
1-4	Your elbows may lightly touch your sides, but don't press them tightly against your body.
1-4	Avoid bending, arching or angling your wrists.
1-7	Use the minimum amount of force that is needed to push down the keys.
1-7	Use your whole arm to move the mouse